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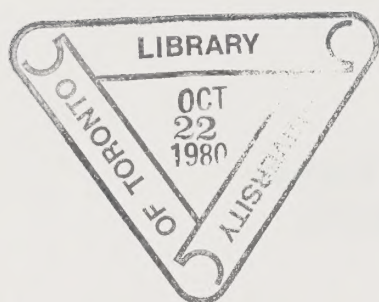
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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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Cited [1978] OLRB REP.

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International Molders and Allied Workers Union, (Applicant), Accurcast Die Casting Limited, (Respondent), Group of Employees, (Objectors).

Certification – Petition – Employee petition requesting representation vote – Petition not indicating employee wishes concerning union membership – Board declining to exercise discretion to order vote

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members C.G. Bourne and W.F. Rutherford.

APPEARANCES: *Ilan J. Neuman appearing for the applicant; S.D. Bowman, W. Huber and R. Jones appearing for the respondent; Max Phenix and Maria Hiraك appearing for the objectors.*

DECISION OF THE BOARD: July 12, 1978

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. Having regard to the agreement of the parties the Board finds that all employees of the respondent at Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 29, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
5. There was filed with the Board a petition signed by a majority of the employees in the bargaining unit. Although the heading on the petition was supplemented later, at the time the employees signed the petition it was headed up simply "this petition is being taken only to force a secret ballot as to whether or not we join the union".
6. The evidence led at the hearing establishes that the petition filed with the Board was not the first petition to be circulated among the respondent's employees in response to the applicant's organizing campaign. An earlier petition had been "passed around" among the employees to enable them to voice their opposition to being represented by the appli-

cant. The Board was not informed as to who was responsible for the origination of this first petition, but the evidence establishes that it was destroyed by Mrs. Maria Hirak, an employee in the bargaining unit. Mrs. Hirak indicated that she destroyed the petition since too few employees were willing to sign it. Mrs. Hirak was also responsible for obtaining all of the signatures on the second petition. She stated that when approaching the employees she advised them that they would be signing only in favour of a vote. During her cross-examination Mrs. Hirak indicated that she felt that many employees would not have signed the second petition had it been worded in opposition to the applicant.

7. As already noted, Mrs. Hirak was responsible for obtaining all of the signatures on the second petition. Initially Mrs. Hirak stated that she had obtained all of the signatures over two of her lunch breaks. During her cross-examination, however, she admitted that although she had been working on the day shift she had signed up some of the employees on the night shift during their working hours.

8. After obtaining the signatures on the second petition Mrs. Hirak gave it to Jayne Cantin. Ms. Cantin is an employee in the bargaining unit who is the daughter of Mr. R. Jones, the respondent's president. Ms. Cantin subsequently gave the petition to a third employee who forwarded it to the Board. Ms. Cantin did not testify at the hearing. It should be noted that Ms. Cantin's signature is the first one on the petition.

9. More than fifty-five per cent of the employees in the bargaining unit became members of the applicant prior to the terminal date. In the normal course this would result in the Board certifying the application outright pursuant to the provisions of section 7(3) of the Act. The Board does, however, have a discretion under section 7(2) of the Act to direct the taking of a representation vote notwithstanding the filing of evidence of membership on behalf of more than fifty-five per cent of the employees in a bargaining unit. The Board will generally exercise its discretion in this regard where a sufficient number of employees who have signed applications for membership in a union have also voluntarily signified by the terminal date that they do not desire to be represented by that union. In such circumstances because of the resulting uncertainty concerning the question as to whether as of the terminal date more than fifty-five per cent of the employees in the bargaining unit actually desired to be represented by the union the Board will direct the taking of a vote.

10. In the instant case the petition filed with the Board does not express opposition on the part of those who signed it to being represented by the applicant. It merely expresses a desire to have a representation vote. The Board's consistent approach to such petitions has been to conclude that because they do not throw doubt on the desire of employees to be represented by a union they are not sufficient to cause the Board to exercise its discretion and direct the taking of a vote. See: *The Diebold Company of Canada Limited* [1976] OLRB Rep. May 238. There is nothing in the circumstances of this case which would cause us to depart from this approach. It is quite apparent that the majority of employees who signed the second petition were earlier unwilling to sign a petition in opposition to being represented by the applicant. Further, some doubt exists in our minds as to whether the petition that was filed is truly reflective of employee desires. Quite apart from the evidence concerning the circumstances under which some of the signatures of employees on the night shift were obtained, the fact that the daughter of the respondent's president was the first one to sign the petition might have caused other employees to reasonably assume that she was somehow involved in the origination of the petition and later would have an opportunity to

ascertain who had signed it. As already noted, Ms. Cantin was in fact given the petition when all of the signatures had been collected. In these circumstances employees may well have signed the petition rather than risk the chance that the respondent through Ms. Cantin would become aware of which employees had refused to sign it.

11. Having regard to all of these considerations the Board declines to exercise its discretion and direct the taking of a representation vote.

12. A certificate will issue to the applicant.

**1812-77-U United Steelworkers of America, (Complainant), v.
Arnold-Nasco Limited, (Respondent).**

S-79 – Duty to Bargain in Good Faith – Objections to the composition of the union’s bargaining committee, direct negotiations with employees thereby bypassing the union, discriminatory layoffs, prompted finding of bad faith bargaining

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members C.G. Bourne and D.B. Archer.

APPEARANCES: *H.P. Rolph, J. Pudge and Carl Gareau for the complainant; Robin B. Cumine, Q.C. and Ross Wilkie for the respondent.*

DECISION OF THE BOARD: July 17, 1978

1. This is a complaint brought under section 79 of The Labour Relations Act in which it is alleged that the respondent has breached sections 58(a) and (c), section 70(1) and section 14 of the Act.

2. On July 25, 1977, the Board granted to the complainant an interim certificate covering all employees of the respondent at Guelph, save and except foremen and supervisors, persons above the rank of foreman or supervisor. There was also excluded, pending the final resolution of the bargaining unit, the confidential secretary to the President.

3. The complainant gave notice of desire to bargain on September 9, 1977 and on September 15th, mailed to the company its contract proposals. Then by further letter dated September 16, 1977, the complainant advised the company that Sharon Doogan and Gilbert MacRobbie would be the employee representatives on the negotiating committee and would attend the bargaining meetings in that capacity.

4. Section 14 of the Act provides as follows:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

As the Board pointed out in *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49 at page 61:

The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective – that of entering into a collective agreement and section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

5. The parties arranged to meet for the purpose of negotiating a collective agreement on September 23, 1977 and further meetings were held on November 7th, December 13th and 14th, and January 11, 1978. The January 11th meeting was held under the auspices of a conciliation officer. On January 20, 1978 the parties were advised that the Minister would not appoint a conciliation board. Mediation meetings were held on March 7th, March 22nd, April 3rd and April 28th.

6. On February 21, 1978 the employees of the respondent in the bargaining unit began a lawful strike which was in effect throughout the hearings before the Board.

7. The complainant requests the Board to declare that the respondent has failed to bargain in good faith; to direct the respondent to bargain in good faith and make all reasonable efforts to make a collective agreement, and that certain persons named as grievors be reinstated or reimbursed for lost wages.

8. The respondent denied the allegations made by the complainant.

9. The complainant sought to prove its allegations not only through evidence dealing with the actual course of the bargaining sessions, but also by reference to concurrent actions of the company which the complainant argued not only were contraventions of the other sections of the Act, but were indicative of a pervasive anti-union motive which, according to the complainant, has affected and frustrated the bargaining process.

10. In support of its contentions, the union adduced evidence with respect to the meeting that had been arranged for September 23rd. At this meeting, the company was represented by Ross M. Wilkie, Vice-President, and by a Mr. Harold A. Ranson, who represented the American parent company. The union was represented by Mr. Carl Gareau, staff representative of the complainant, and by Sharon Doogan and Gilbert MacRobbie, the two persons referred to in the union's letter to the company of September 16, 1977. The evidence of the complainant is that the company took the position at the hearing that Doogan and MacRobbie exercised managerial functions as warehouse foreman and office supervisor respectively, and that, therefore, they were not proper persons to be on the union's bargaining committee.

11. The evidence establishes that MacRobbie and Doogan were the two people who did the organizing of this unit which comprised twelve employees. These two had attended all union meetings and had been selected to the bargaining committee before the application for certification was made. There was evidence that it was common knowledge throughout the plant as to who were and who were not supporters of the union; and it is inconceivable that the company were unaware of the leadership of Doogan and MacRobbie.

12. The evidence of Mr. Gareau was that the company refused to commence to bargain because of the presence of Doogan and MacRobbie and that that being the case, the union had no alternative but to leave. There was no evidence given by anyone from the company concerning this meeting.

13. There was put into evidence the following correspondence:

September 23rd, 1977

United Steelworkers of America
89 Dawson Road
Guelph, Ontario

Attention: Mr. Carl Gareau
Staff Representative

Dear Sirs:

RE: Negotiations Collective Agreement

In view of your actions in walking out of the meeting held on the morning of September 23rd, 1977 when the meeting had only just begun we felt we should write to you to make certain that our position is quite clear.

1. We are and have been quite prepared to sit down and commence bargaining for a Collective Agreement.
2. We have conducted an extensive review of your proposals and are prepared to discuss our position with you fully.
3. In anticipation of meaningful bargaining we had Mr. Harold A. Ranson from our American parent corporation in Fort Atkinson, Wisconsin attend to engage in collective bargaining.

4. We advised you at that outset of the meeting and we are not prepared to bargain with a union negotiating team comprised in the main of persons specifically excluded from the bargaining unit as being of Managerial level and suggest that it is quite improper for the union to put the company or these individuals in such a position.
5. We have remained prepared to bargain and consider that your actions in walking out of our meeting represent a failure to bargain in good faith.
6. We are prepared to arrange a new meeting with a properly constituted union bargaining committee at any reasonable time.

Yours very truly,

Ross M. Wilkie
Vice President

RMW/hg

26 September 1977

Mr. Ross M. Wilkie, Vice President
Arnold-Nasco Limited
58 Dawson Road
Guelph, Ontario

Dear Mr. Wilkie:

Thank you for your letter of September 23, 1977.

The Union is obviously interested in negotiating a collective agreement. The selection of a negotiating committee is done by the members of the bargaining unit at no time in the past were the two members of the bargaining committee ever advised that they had the positions and responsibilities that you outlined on Friday nor do they wish to have such authority.

The Union is therefore not prepared to replace these individuals from their committee. We respectfully suggest that we resume bargaining immediately and that we submit the status of the committee to the Ontario Labour Relations Board. The committee members will be replaced immediately should the Board rule that they are not in fact properly in the bargaining unit.

I have today filed an application for conciliation services. I will withhold any further legal proceedings pending your reply to this letter. The Union would very much like to enter these negotiations in an atmosphere of cooperation and business like manner. I hope you will see fit to accept this proposal as the best way of attaining this goal.

Awaiting your reply, I remain

Yours truly,

UNITED STEEL WORKERS OF AMERICA

Carl Gareau, Representative

cc:P. Warrian
bcc:Sharron Doogan

October 4th, 1977

Mr. Carl Gareau
United Steelworkers of America
89 Dawson Road
Guelph, Ontario
N1H 1B1

Dear Mr. Gareau:

Thank you for your letter of September 26th, 1977. As you are no doubt aware this was delivered to my office on September 27th, 1977 while I was away, and only came to my attention on my return yesterday.

We have given very serious consideration to your proposals in view of our wish to proceed with bargaining and avoid unnecessary areas of disagreement, but have concluded that we simply cannot agree to proceed as you have suggested.

We were a little surprised at your statement that the two individuals were not aware of their positions and responsibilities since their positions are specifically excluded from the bargaining unit by description you requested and agreed to, and because no exception was taken by you to the fact that they were not on the list of employees in the unit filed with the Company reply. This, notwithstanding the fact that you did challenge one of our exclusions.

In view of the positions occupied by these individuals, and the duties they would be called upon to perform if a collective agreement were entered into in the terms proposed by you, we do not feel it is at all right or proper that they be involved in bargaining as representatives on the bargaining committee. In fact they have so far constituted the majority of the committee. This being the case we do not see how bargaining can go forward at all if you insist on them continuing on your committee and frankly it seems to us that for you to insist upon their inclusion before you will conduct bargaining is not acting in good faith.

We would be prepared to meet with a properly constitute bargaining committee, not including our office supervisor and warehouse foreman, and to

co-operate with you in having the question of their capacity to be on the bargaining committee brought before the Ontario Labour Relations Board as soon as possible. Perhaps you might let us know how you suggest this be best done.

Would you please let us know if a new meeting date can be arranged on this basis.

Yours very truly,

Ross M. Wilkie
Vice President

14. It is difficult to follow the reasoning behind the company's statement in the first of its letters that it considered the union's action in "walking out of our meeting" to be a failure to bargain in good faith. The difficulty arises by reason of the uncontradicted evidence of the union that it was the company who refused to bargain with the committees as it was composed. The union is entitled, subject of course to the provisions of the Act dealing with management participation, to define its bargaining committee without interference by the employer. Its withdrawal in the face of the company's belated challenge to and its refusal to bargain with the committee cannot therefore be characterized as failure on the part of the union to bargain in good faith.

15. On the other hand, the evidence is clear that Sharon Doogan attended the certification hearing which took place in July in the company of Gareau. Wilkie was also present at the hearing. No question appears to have been raised with her concerning her presence at the hearing or her absence from work on the day of the certification hearing. Furthermore, the evidence of MacRobbie, which was uncontradicted, was that he had been called into the office by the warehouse manager, Bob English, on September 22nd, the day prior to the date set for the first bargaining meeting. MacRobbie testified that English said to him, "If I were you, I would not go to that meeting tomorrow; something is going to happen". He also asked MacRobbie if he knew what he was doing.

16. If nothing else is clear from that conversation, it is beyond dispute that the warehouse manager knew, at least the day before the meeting, that MacRobbie was on the bargaining committee. Nothing however had been raised up to that point about MacRobbie's alleged management status or that of Doogan. No explanation was offered at the hearing as to what lay behind the admonition given by English. The obvious inference is that something adverse to MacRobbie's interests had been planned.

17. In our opinion, even if it were to be assumed that there was a genuine belief on the part of the company that MacRobbie and Doogan exercised managerial functions, a claim which took MacRobbie entirely by surprise and which was subsequently rejected by the Board after an inquiry, the delay itself in raising the issue until the very morning of the meeting appears to us to have been an act on the part of the company designed to embarrass and frustrate the union at the very outset of the bargaining. There was no attempt made by the company at the hearing to explain the delay in raising this issue. Notwithstanding the patent attempt by the company to label the union position as constituting bad faith bargaining, we find that the conduct of the company in this incident was contrary to the requirements of section 14 of the Act.

18. The complainant also introduced evidence which establishes that at the December 14th meeting, the complainant had turned down a proposal put forward by the respondent that employees' wages be paid bi-weekly, with wages being deposited directly into bank accounts held in the names of employees. Notwithstanding this, the respondent required employees to sign authorization forms by which their wages were paid directly into bank accounts held in their names at a bank selected by the respondent. Employees had previously been paid by cheques which they could cash at their own banks.

19. The change in the method of payment implemented by the company was of minor proportions. It did not, for instance, involve a change from payment by cash to payment by cheque. The point is, however, that the change was made during the course of bargaining in which that very item had been discussed and rejected by the bargaining agent for the employees concerned. This action of the company is a clear indication of an intent to bypass the bargaining agent and to denigrate it in the eyes of the employees. It was thus an act contrary to the requirement of section 14 to bargain in good faith and make every reasonable effort to make a collective agreement.

20. One of the matters referred to by the union was the discharge by the company of Mary Smith, an employee in the office part of the bargaining unit. The Board has carefully reviewed all of the evidence with respect to the discharge and finds that Mary Smith was discharged solely for incompetence and not because of her union membership.

21. There was evidence about rules and instructions made by the company governing movement of employees throughout the plant, the playing of chess and card games during lunch hours and coffee breaks, and the exit from the plant by one door rather than the other. This occurred about January 6th to 8th, 1978.

22. In the eyes of the union this was seen as harassment of the employees with a view to discouraging their reliance on the union. On the other hand, it was the company's contention that there had been abuse of the breaks because of the competition in the games and that it was necessary to veto the games in order to have the employees conform to the time periods of the breaks. There was some support, on the union's own evidence, for the company's position insofar as the abuse of the breaks were concerned.

23. The company said that the restriction of movement between the warehouse and the office was necessary because a lot of time was being wasted in group conversations, and its action was, in fact, a reaction to this situation. The bargaining unit in this case comprised office and warehouse employees.

24. There can be little doubt that an employer is entitled to see that its employees adhere to the time limits of the lunch period and coffee breaks, and that it is not required to tolerate interference with normal, internal order and the normal productivity of the plant during the periods covered by section 70 of the Act. In the present instance, however, it is not difficult to see how the parental stance of the company in ordering the removal of the cards, magazines and chess games from the lunchroom was felt to be an unreasonably punitive and demeaning tactic designed to weaken the employees' regard for the union.

25. A further instance brought forward by the union occurred on February 20, 1978. On that date the company laid off two employees from the warehouse. The following morn-

ing the third employee was laid off. All three were union supporters. Each employee received the following letter.

Meetings were held on February 18th and 19th to review the company financial position. At that time we also reviewed the current economic conditions existing in Canada. The business climate in the agricultural, veterinary, and educational community is extremely depressed.

We regret to inform you of a temporary lay-off. We anticipate improvement in business upon the issuance of new catalogues. At that time we will be pleased to recall you back to work. Please re-confirm with me today where you can be reached during the lay-off period.

We would also like to inform you that your employee benefits during the term of lay-off will be held in effect.

At 10:30 on February 21st the employees commenced a lawful strike. On February 24th the laid-off employees who, in the meantime had been on the picket line, received letters dated February 22nd recalling them to work. The employees who received the recall notices elected to remain on strike. One result of this election was that these employees were advised by the unemployment insurance authorities that they were disqualified for payment as laid-off employees.

26. It was the contention of the union that the layoff and recall were discriminatory acts on the part of the company and were contrary to section 58 of the Act.

27. The company witness, Maurice Van Hemmen, said that neither the layoff nor the recall were his decisions but that they had been made by Wilkie and with respect to the recall at least, the company directors. Van Hemmen said that he had attended company meetings and that the layoffs were dictated purely by economic conditions and had nothing whatever to do with the presence of the union.

28. Van Hemmen's reasons given at the hearing were virtually the same as those set out in the layoff letter referred to above. They are equally subjective, general, and lacking in detail and specifics and are, consequently, not persuasive.

29. The evidence of the laid-off employees was that there was work to be done and that the company, in fact, had been complaining of a slowdown by the employees at the time the layoff occurred. The union evidence was that there had been no similar layoffs at any time previously.

30. Although the incidents of the layoff, recall and strike all took place subsequent to the expiry of the limits set out in sections 63 and 70, and thus occurred at a time when recourse to lockout and strike became lawful, the company made no reference to that fact in dealing with the layoff incident. The company, as already indicated, argued that its action was dictated by adverse economic conditions and was unrelated to the union's presence.

31. In our opinion, the evidence of the company, with its lack of specificity and concrete statistics, does not support its argument that economics dictated the layoffs. The

layoff, according to the company's own evidence, was not for the purpose of bringing economic pressure to bear on the union in order to effectuate a settlement of the labour dispute, nor was it a lawful response to economic pressure executed by the union. In view of that, and since the Board has found that the company has failed to satisfactorily explain its actions on the evidence adduced at the hearing, it is clear that the company has not met the onus cast upon it by section 79 (4a) of the Act with respect to the employees whom it laid off. (See *Hydro-Electric Power Commission of Ontario*, [1970] OLRB Rep. Dec. 962.)

32. The Board accordingly finds that Bill Ware, Lisa Souter and Jeff Jobb were dealt with by the company contrary to the provisions of section 58 of the Act. The Board directs the company to forthwith pay to Bill Ware, Lisa Souter and Jeff Jobb all wages lost by them between the date and time of their respective layoffs and the commencement of the strike at 10:30 a.m. on February 21, 1978. It is beyond doubt that these employees would have gone out on strike at that time. The Board retains jurisdiction to deal with the matter of compensation in the event that the parties are unable to settle the matter.

33. In the circumstances of this case, we feel obliged to point out that the declaration contained in section 3 of the Act to the effect that every person is free to join a trade union of his choice and to participate in its lawful activities is not simply a pious, socio-philosophical platitude. It is a declaration that requires specific application and means, in the present instance, that Gilbert MacRobbie, Sharon Doogan, Jeff Jobb, Lisa Souter and their fellow employees at Arnold-Nasco Limited are persons who are free to join the United Steelworkers of America and to participate in its lawful activities.

34. The Board has certified the United Steelworkers of America as the sole and exclusive bargaining agent for the employees of Arnold-Nasco in the bargaining unit referred to above, and these parties are bound by section 14 to bargain in good faith and make every reasonable effort to make a collective agreement. The Board directs that they forthwith proceed to do so, preferably with the assistance of the mediator with whom they have been dealing at the date of the hearings.

1922-77-M Labourers' International Union of North America, Local 183, (Applicant), v. Metropolitan Toronto Apartment Builders Association and Cadillac-Fairview Corporation Limited, (Respondents).

Arbitration – S.112a – Allegation of dismissal without just cause – Grievance settled by properly constituted committee not arbitrable

BEFORE: N.B. Satterfield, Vice-Chairman, and Board Members W.H. Wightman and W.F. Rutherford.

APPEARANCES: S.B.D. Wahl and L. Castaldo for the applicant; Joseph Carrier, Karl Mallette and Emily Del Piero for the respondents.

DECISION OF THE BOARD: July 11, 1978

1. The name: "Cadillac-Fairview Corp. Ltd." appearing in the style of cause of this application as the name of one of the respondents is amended to read: "Cadillac Fairview Corporation Limited".
2. This is a referral of a grievance under section 112a of The Labour Relations Act.
3. This matter arose out of the alleged dismissal without just cause of an employee of the Cadillac-Fairview Corporation Limited. Cadillac-Fairview is a member of the respondent Association and is bound by the terms of a current collective agreement between the parties hereto which expires April 30, 1979. This agreement contains provisions in Article 4 – Grievance Procedure and Article 5 – Arbitration for the settlement of disputes arising during its operation. The clauses significant for this application reads as follows:

ARTICLE 4 – GRIEVANCE PROCEDURE

- 4.01 The parties to this Agreement are agreed that it is of the utmost importance to adjust complaints and grievances as quickly as possible.
- 4.02 It is understood and agreed that an Employee does not have a Grievance until he has discussed the matter with his Job Superintendent and given him an opportunity of dealing with the complaint. The Employee may have his Steward or Business Representative present, if he so desires.
- 4.03 Grievances properly arising under this Agreement shall be adjusted and settled as follows:
 - (i) Within twenty-one (21) days after the circumstances giving rise to the Grievance occurred or originated (except in the case of a Discharge Grievance, which shall be presented within five (5) working days), the Grievance shall be presented to the Employer in writing, and the parties shall meet within five (5) working days in an endeavour to settle the Grievance.
 - (ii) If a satisfactory settlement is not reached within five (5) working days from this meeting, then the Grievance may be submitted to a Committee consisting of two (2) Members of the Union and two (2) Members of the Association at any time within five (5) working days thereafter, but not later, and if a satisfactory settlement is not reached within five (5) working days from this meeting, the Grievance may be submitted to Arbitration as provided in Article 5, at any time within ten (10) working days thereafter unless mutually agreed by the parties.

ARTICLE 5 – ARBITRATION

- 5.01 The parties to this Agreement agree that any Grievance concerning the interpretation or alleged violation of this Agreement, which has been properly carried through all the steps of the Grievance Procedure out-

lined in Article 4 which has not been settled will be referred to an Arbitrator at the request of either of the parties hereto.

4. The preamble of the collective agreement provides as follows:

(This Agreement applies to APARTMENT BUILDERS only)

THIS AGREEMENT made and entered into this 28th day of July, 1977

BETWEEN:

THE METROPOLITAN TORONTO APARTMENT BUILDERS
ASSOCIATION
hereinafter called the "Employers"

OF THE FIRST PART

– and –

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL No. 183
hereinafter called the "Union"

OF THE SECOND PART

WHEREAS the Association acting on behalf of the Companies whose names appear on the attached Schedule of Employers and the Union wish to make a common Collective Agreement with respect to certain Employees of the Employers engaged in Construction as defined in Article 1 of this Collective Agreement and to provide for and ensure uniform interpretation and application in the administration of the Collective Bargaining Agreement;

AND WHEREAS in order to ensure uniform interpretation and application of the Collective Agreement, the said Union recognizes the formation by the Employers of the Association and agrees to deal with the said Association as the agent of the Employers who are Members thereof in negotiation and administering a common Collective Agreement and agrees not to negotiate with any of the said Employers on an individual basis;

AND WHEREAS the Employers recognize the Union as the Collective Bargaining Agent with respect to the Employees of the Employers covered by this Agreement;

NOW THEREFORE it is agreed as follows:

5. At the hearing, counsel for the respondent raised a preliminary challenge to the Board's jurisdiction to hear the complaint on the grounds that there was no grievance since the alleged grievance had been settled at the second step of the grievance procedure outlined above in clause 4.03(ii) by virtue of a unanimous decision of the committee established under that clause to dismiss the grievance. The respondent maintains that a majority deci-

sion of the committee is binding upon both parties to the collective agreement and upon the employers and employees whom they represent who are affected by the decision; that a majority decision of the committee constitutes satisfactory settlement under clause 4.03(ii); and, furthermore, that this position is confirmed by the consistent practice of the parties in dealing with grievances at that step of the grievance procedure. Counsel for the applicant holds the contrary view, maintains that the practice of the parties is not determinative of the meaning of the clause and that the decision of the committee is not of itself evidence of a satisfactory agreement.

6. The Board has authority under section 112a of The Labour Relations Act to determine an alleged grievance referred to it by a party to a collective agreement in the construction industry, notwithstanding the grievance and arbitration provision of the collective agreement. (See *Lummas*, [1976] OLRB Rep. Jan. 980.) However, where it has found that the grievance has been settled, it has determined that the matter is not arbitrable. (See *Crown Electric, owned and operated by Crowle Electric Ltd.*, Board file no. 1711-77-M, as yet unreported.) Therefore, at the hearing, the Board ruled that it would hear the parties' submissions on the preliminary issue of whether the grievance was settled and not on the merits of the complaint. This decision deals with that issue alone.

7. There is no issue before the Board on whether the conditions precedent to the second step meeting at clause 4.03(ii) were satisfied. The evidence is that it was heard at the first step, clause 4.03(i), directly between the employer, Cadillac-Fairview, and the Union, the Association, having been notified by the union that such a meeting would take place. The union notified the Association by letter dated February 22, 1978 that it wished to proceed to the second step. A committee was constituted and the meeting held on March 7, 1978. The committee was composed of Messrs. Quinto Ceolin and Tony Bernardini Local 183, and Messrs. George Seidel and Benny Freedman representing the Association, with Mr. Seidel as chairman. Messrs. Ceolin and Bernardini, business representatives of Local 183, were appointed by Mr. Louis Castaldo, assistant manager of the Local. Messrs. Seidel and Freedman were volunteers from two employer members of the Association (not from Cadillac-Fairview) appointed by Mr. Karl Mallette, executive director of the Association. Mr. Mallette fulfills the role of recording secretary at the second step meetings and was present in that capacity during the meeting of March 7th. Mr. Castaldo also presented the case for the union's grievance to the committee. Each of these persons was the only witness for his parties' examination-in-chief at the hearing before the Board. At the grievance meeting with the committee, Cadillac-Fairview representatives presented its case. The employee grievor was not present at the meeting. The committee heard the representations of the parties and then met in camera to make its decision. Mr. Mallette attended as recording secretary. After discussion involving all committee members, the chairman, one of the employer representatives, polled the three other members for their decisions which were for dismissal of the grievance and then added his own to make it unanimous. Whereupon he instructed the recording secretary to have this decision recorded on the format which is illustrated below. When this was done the parties were called back to the meeting and advised of the committee's decision.

IN THE MATTER OF A GRIEVANCE

FILED AGAINST ITED	CADILLAC-FAIRVIEW CORPORATION LIM- (Mr. Don Campbell)
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Ms. Emily del Piero
Mr. Filini Guerrino (F'man)

BY : LABOURERS' Local 183

ON BEHALF OF : Mr. Antonio CRAPORATTA

Grievance Committee composed of:

MTABA : Mr. George Seidel (Chairman)
Mr. Benny Freedman

UNION : Mr. Quinto Ceolin
Mr. Tony Bernardini

IT IS THE DECISION of the Committee that:

The Grievance is dismissed.

For MTABA:

For the UNION:

"G. Seidel"

"A. Bernardini"

G.Seidel

"B. Freedman"

"Q. Ceolin"

B. Freedman

DATED this 7th day of March, 1978
Toronto, Ontario.

All of the subject matter headings punctuated by a colon are the pre-printed form. The wording following the punctuation and appearing above the second broken line is typed in prior to the meeting. The information below that line is added on instruction of the committee chairman after the committee has made its decision and before the parties are called back. The recording-secretary has the required wording typewritten in and it is then signed by the members who are in agreement with the decision. A dissenting member withholds his signature and his name is typed under the signature line with the word dissent appearing alongside in parentheses.

8. It is helpful in determining the issue before us to examine the purpose of grievance procedures in collective agreements. They are designed typically to provide the parties to the agreement and the employees in the bargaining unit with a method for the orderly processing of their respective grievances. Orderly processing contemplates provisions also for bona fide efforts being made by the parties to the procedure to settle the grievance at any of the various steps of the procedure. Despite the contemplation of bona fide efforts of settlement, grievance procedures seldom spell out the power or authority of the parties' representatives at each step. However, if a grievance procedure does not grant explicit powers to the representatives, they must have implied powers if the purpose of the procedure is to be met. When they exercise that power, they do so as agents of the parties.

9. Local 183 and the Association, acting for their constituents have attempted to sat-

isfy that purpose by negotiating a grievance procedure which, according to the evidence of the parties, involves the union and the employer at the first step, clause 4.03(i). If those parties cannot settle the grievance it may be taken to the next step by either party to the collective agreement, clause 4.03(ii). There it is submitted, not to higher level authorities from the union and the employer or even from the parties to the agreement (the union and the association), but, to a new entity: a committee made up of two members of the union and two members of the association. However, the agreement is silent on the authority of the committee, as it is on what constitutes a satisfactory settlement. Our problem lies within this inherent ambiguity of the language. What function did the parties intend the committee to exercise? Were its decisions to be persuasive only, have no binding effect on the parties and therefore not represent settlement, as the applicant contends? Or were they binding on the parties to the agreement (and their affected constituents) and therefore constitute settlement as the respondent contends? There is nothing in the past practice of the parties in respect to issues proceeding to arbitration that assists the Board in answering those questions. There is only one instance within the knowledge of the two witnesses of a grievance going to arbitration. In that instance, the parties agreed to submit it directly to arbitration, bypassing the second step.

10. Counsel for the applicant, to support its position that the committee's decision does not constitute settlement of the grievance, argued the case of *Re Johnson Bros. Electric Co. Ltd. and International Brotherhood of Electrical Workers, Local 424*, (1972) 1 L.A.C. (2d) 431 (Melnik). The grievance procedure in that case established a Joint Conference Committee (with equal representation from the union and employers) to deal with grievances at the step before arbitration. It further provides that the committee "...shall meet and decide any grievance..." and "If a grievance is not settled by the Joint Conference Committee, it may be referred to arbitration...". The arbitrator who was dealing with a grievance alleging wrongful dismissal of an employee ruled as follows: "Having regard for the facts, it is quite clear that there has been no actual settlement of the grievance between the grievor and the employer. A dismissal of a grievance by the Joint Committee without more, cannot be viewed as a settlement of a grievance under 2.08(c)". This case may be distinguished from the one before the Board because the employee grievor had a right of carriage. The employee in the case at hand has no right of carriage from the first step and the employer has none after the first step.

11. Likewise, counsel for the respondent cited the case of *Re Powers Regulator Company of Canada Limited and Local 46, the United Association of Journeymen and Apprentices of the Pipe Fitting Industry of the United States and Canada* (1971), unreported, to support the position that a decision of the committee was settlement of the grievance. The grievance procedure of the case cited gives a Joint Conference Board explicit powers not contained in the language before us, therefore, it is of no assistance.

12. The applicant is asking the Board to see the intent of the parties, in adopting the committee structure at step two, as allowing either the union (acting for the grievor) or the employer, against whom the grievance has been entered, to veto a decision of the committee. The respondent is asking the Board to see the intent of the parties in respect to the committee as having given it the power to bind the parties by its decision, making arbitration possible only if the committee fails to reach a decision, which would be the case if two members voted to dismiss a grievance and the other two voted to allow it. Let us examine the intent stated by each party against the purpose of grievance procedures.

13. Looking first at the applicant's proposition, the past practice of the parties indicates they are in agreement that the right of carriage of the grievance at the first step rests with the union and the employer and at the second step, with the union and the association. The same two parties each have the right and responsibility to appoint two members to the committee at that step. According to the applicant's proposition, that committee, once appointed, can only attempt to persuade the two parties appearing before it to accept its unanimous or majority decision. If both parties accept, there is a satisfactory settlement of the grievance and if either rejects the committee's decision there is no settlement. There are a number of things wrong with that result. It excludes from the settlement decision one of the parties (the association) which has a right of carriage of the grievance at that stage. It misplaces the persuasion element of the grievance settlement process. It is by its nature a persuasive process. If a grievance is not abandoned, the way it is settled prior to arbitration is by one party persuading the other to a particular point of view. The premise put to this Board by the applicant is that the four representatives of the parties on the committee must first persuade at least three of them to a common viewpoint and, if able to do so, then turn and persuade the parties who have been appearing before the committee to that same viewpoint. If the parties who are presenting and responding to the grievance at this stage have the right to determine whether it goes to arbitration, why not involve them directly so that they can attempt face to face to persuade each other to a settlement? Overall, the applicant's proposition would seem to frustrate the orderly processing of grievances and bona fide efforts to settle them.

14. Next, turning to examine the respondent's proposition that the committee has the power to bind the parties by its decision on grievances, the facts in this case provide some support for it. They establish that the past practice of the committee has been to hear the representations of the parties to the grievance, discuss these in camera, poll its members and record the results. The results may be either a unanimous or a majority decision, or alternatively failure to reach a decision. The respondent's premise infers that the parties may only make an election in respect to arbitration if the committee fails to reach a decision. This proposition is in greater harmony with the purpose of grievance procedures than that of the applicant.

15. Having regard for the purpose of grievance procedures and all of the circumstances of this case, the Board finds that the language of the collective agreement logically bears the interpretation that a decision of the committee constitutes a satisfactory settlement under clause 4.03(ii) of the agreement. Therefore, the decision of the committee in the grievance before this Board constitutes settlement of the grievance and it is not arbitrable.

16. The applicant's referral of the grievance is dismissed.

1787-77-M Local 787, Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant), v. **Consolidated Maintenance Services Limited**, (Respondent).

Arbitration – S.112a – Whether grievors have been improperly laid off or unjustly dismissed

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members J.D. Bell and E. Boyer.

APPEARANCES: *Thomas Kuttner, Adam Pivnik and M. Chorney for the applicant; Donald F.O. Hersey and Ron Campbell for the respondent.*

DECISION OF THE BOARD: July 20, 1978

1. This is a referral of a grievance to the Board pursuant to section 112a of The Labour Relations Act.
2. At the hearing counsel for the respondent withdrew an earlier submission that the Board lacked jurisdiction to entertain the grievance and specifically acknowledged that the grievance was properly before the Board for determination.
3. The grievance alleges that the respondent unjustly dismissed both Mr. R. Kavanagh and Mr. R. Heaney ("the grievors"). At the hearing counsel for the applicant submitted as an alternative argument that if the grievors had not been dismissed by the respondent then they had been improperly laid off.
4. The respondent contends that the two grievors were not discharged but rather laid off. Counsel for the respondent acknowledged that just cause did not exist for the grievors to be discharged. He also acknowledged that three employees with shorter periods of service with the respondent had been retained in employment.
5. The respondent is engaged in certain work at the Toronto International Airport under a contract with the Department of Transport. Payment to the respondent is made by the Department on the basis of the number of man-hours worked by the respondent's employees. At the end of 1977 and commencement of 1978 the Department engaged in a major cost reduction program. On January 25, 1978 the Department, as part of this program, sent a letter to the respondent notifying it that it would be required to reduce by two the number of its employees at the airport. The letter went on to say "May we suggest that the two technicians that you recall from our work force be your Mr. R. Cavanaugh and Mr. R. Heany."
6. On January 31, 1978 the respondent purported to lay off the two grievors. They have not been replaced. At about the same time that this occurred another of the respondent's employees at the airport voluntarily terminated his employment. On directions from the Department of Transport he also was not replaced. Thus the respondent reduced by three the number of its employees at the airport.
7. In *Re United Automobile Workers, Local 1525 and Northern Electric Co. Ltd.* 23 L.A.C. 104 (Weatherill) a lay-off was defined as being a severance of the employment relationship, in the narrow sense of that term, for the purpose of reducing the employment force

in order to meet the manning requirements of the employer. We would adopt this definition. Having regard to the facts set out above we are of the view that the respondent's actions in this case came within the definition of a lay-off. The issue before the Board, therefore, is whether or not the respondent violated the collective agreement between the parties when it laid off the two grievors while retaining in its employ three employees with shorter periods of service.

8. The relevant provisions of the collective agreement are set out below:

5:01(c)(in part)

The following are solely and exclusively the responsibility of the Employer:

- (e) The right to decide on the number of employees needed by the Company at any time
- (f) (1) The direction of the employees including the right to hire, suspend or discharge for proper cause and the right to relieve employees from duty because of lack of work or other legitimate reasons is vested exclusively in the company subject to this Collective Agreement and in particular, subject to the grievance and arbitration procedures provided herein.

26:01 Any employee who feels that he has been unjustly dismissed, laid off, suspended or dealt with in violation of the agreement must inform the company and the union in writing with 5 working days of the violation and the matter will be dealt with from then on as a grievance.

9. Counsel for the applicant contended that 26:01 of the collective agreement imposes an obligation on the respondent not to lay off employees unjustly, and that this implies that the seniority of employees must be a major factor in determining which employees are to be laid off. We are not, however, prepared to imply such a term into the agreement. It is extremely common for collective agreements to contain detailed provisions concerning how seniority will accumulate and how it will be applied in determining the order in which employees are to be laid off. Where, as here, the parties to the agreement have not included such a provision we can only assume that they did so deliberately. This being so, it would be improper for the Board to imply such a condition into the agreement. It should be noted that in the construction industry, as opposed to the manufacturing sector, the lack of any seniority restrictions on the ability of an employer to lay-off employees is not at all uncommon.

10. As noted above, counsel for the applicant contended that article 26:01 of the collective agreement requires that employees not be laid off unjustly. Apart from his submission that an unjust layoff was one where an employee's seniority was not a major consideration, counsel also submitted that for a layoff not to be unjust management's decision to lay off a particular individual must not have been unreasonable. Counsel also contended as a general proposition that management cannot act in an arbitrary manner in deciding which employees are to be laid off. For the purposes of these proceedings, and

without making a decision on the point, we are willing to assume that the respondent would have acted improperly and in violation of the collective agreement had its decision to lay-off the grievors been unreasonable or made in an arbitrary manner.

11. There is no evidence before the Board, apart from the grievors' longer service, which would indicate that they were as skilled or as competent and efficient as the three more junior employees who were retained by the respondent. There is, however, evidence which establishes that the respondent experienced difficulties with the grievors' work performance. The grievors themselves acknowledged that the respondent's working foremen, who are union members within the bargaining unit, have on a number of occasions complained about the level of their work performance. Mr. Maurice Christink, the Mechanical Superintendent of the Airport, testified that as far as the Department of Transport was concerned the two grievors were the least effective of the respondent's employees and that is why they were specifically mentioned in the Department's letter to the respondent of January 25, 1977.

12. Counsel for the applicant made much of the fact that the respondent did not lead any direct evidence to show how it reached its decision to lay off the grievors as opposed to two of the more junior employees. He contended that lacking such evidence the Board should conclude that the respondent acted arbitrarily and unreasonably. The onus of proving that the respondent's decision to lay-off the grievors was unreasonable or arbitrary, however, rests with the applicant. It may well have been that had the facts established before the Board been somewhat different the failure of the respondent to lead evidence concerning how it actually reached its decision to lay off the two grievors might have led to a reasonable conclusion that the decision itself was unreasonable or that it had been made in an arbitrary manner. Here, however, where it is established that the respondent encountered difficulties with the grievors' work performance, where the respondent's client recommended that they be the two "recalled" and where, in addition, there is no evidence at all to indicate that the grievors were at least as capable as the three more junior employees, the Board is simply not prepared to conclude that the respondent's decision that they should be the two to be laid off was unreasonable or that it was made in an arbitrary manner.

13. The grievance is accordingly dismissed.

1835-77-U Toronto Typographical Union No. 91, (Complainant), The Daily Times, (Respondent).

S-79 – Duty to Bargain in Good Faith – Employer position on union security found to be neither surface bargaining nor bargaining in bad faith

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W.F. Rutherford and E.C. Went.

APPEARANCES: James Buller and Michael Diamond for the applicant; Colin Morley, Clarence Wiseman and William Ryrie for the respondent.

**DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER
E.C. WENT: July 12, 1978**

1. This is a complaint filed under section 79 of the Act in which the complainant union alleges that the respondent company has violated section 14 of the Act. Section 14 of the Act requires that both parties to the collective bargaining process bargain in good faith and make every reasonable effort to conclude a collective agreement. The complaint alleges that:

“On or about January 13 and ongoing the grievors were dealt with by the Respondent company and its parent company; present were Mr. C. Wiseman Publisher, Mr. W. Ryrie, Thomson Newspapers and Mr. J. Haskett of the respondent, contrary to the provisions of section 14 of the Labour Relations Act in that he did on his own behalf or on behalf of the respondent: refuse to respond to the Union’s proposals in any full or meaningful manner or table any extensive or full counter-proposals on behalf of the company.

Furthermore by announcing impending and current written company proposals of an ‘open shop’ nature which no union can endure, the company and its parent company had made a determination to avoid their proper collective bargaining responsibility.

The company’s refusal to negotiate in any way at the February 24 and March 1 meetings and insisting on terminating conciliation services on March 1 is hereby noted.”

2. The union was certified under the provisions of section 6(1a) on December 2, 1977 as bargaining agent for a unit of editorial room employees at the Brampton Times. At the time of its certification for the editorial room employees the union was party to an expired collective agreement with the respondent employer covering its composing room employees. The composing room agreement had expired on September 15, 1977. Negotiations between the parties for a renewal to the composing room agreement continued in December and into January, 1978. At a composing room negotiating meeting on January 3 the union supplied the company with its bargaining proposals in respect of the editorial unit. Direct negotiations commenced on January 13, 1978. The union had applied for conciliation services prior to the first negotiating session.

3. Mr. Michael Diamond, the secretary/treasurer of the Toronto Typographical Union for the past 14 months and a member of the editorial room bargaining committee at the Brampton Times, was called to give evidence in support of the allegation. Mr. Diamond testified that the publisher, Mr. C. Wiseman, asked the union to read aloud each of its proposals at the commencement of the January 13th negotiating meeting. The meeting commenced at 3:30 p.m. and the union had not completed reading of its proposals when the meeting adjourned at 6:00 p.m. It is not unusual in the newspaper industry for small employers to conduct negotiations after the paper has been put out. The second session commenced at 3:30 p.m. on January 18th in the presence of a conciliation officer. Mr. Diamond testified that the union was required to continue the reading of its proposals with no formal response from the company. Mr. Diamond admitted in cross-examination that Mr. Wise-

man, in requesting the union proposals be read, said that he wanted to understand what he was being asked to agree to because he had to live with it. Mr. Diamond further admitted that the company said they would be taking a clause by clause approach rather than making total package responses. Indeed, the evidence establishes that at the third negotiation session on February 2, 1978, the first meeting following the reading of the union's proposals, the company made proposals in four areas. Mr. Diamond described these as "minimal" and as dealing with "the basics under law." He admitted, however, that the company stated its intention to initially deal with matters which would result in agreement. The company continued to conduct itself on a clause by clause basis in the subsequent negotiation sessions.

4. On February 8, 1978 a story appeared in the Brampton Guardian, the non-unionized competitor of the respondent, quoting Mr. J. Buller, the president of the local union, on the progress of negotiations at the Brampton Times. Mr. Buller is quoted as referring to union security and wages as "big issues" and as describing the Thomson group as "an extremely tough outfit." Mr. Diamond admitted that at the time the story was reported the company had not made formal offers covering either wages or union security. Mr. Wiseman castigated the union at the February 9th negotiating meeting for publicising their negotiations in a non-unionized paper which stood to gain from the publicity at the expense of both the company and the union. Mr. Wiseman tabled with the union a statement which read:

"The company feels it is in the best interests of both parties to respect the confidentiality of negotiations during conciliation. Should the union choose a different course the company shall have no alternative but to seek the issuance of a no-board report."

The union remained silent. The negotiations continued without agreement as to confidentiality. Mr. Buller was again quoted in the Brampton Guardian in an article which appeared on April 26, 1978.

5. The union brought a number of "observers" to the negotiations who were neither employees of the Times nor members of the union.

6. At the conclusion of the conciliation meeting of March 1, the company requested a no-board report. Following release of the Minister's no-board report, a mediator was appointed. Six negotiation sessions were carried on under his auspices prior to the break-off of negotiations on May 3, 1978. The evidence establishes that as of March 29th the company had tabled proposals on all outstanding items except the salary scale. A company offer of settlement dated April 28, 1978, which was delivered to the union on May 3, 1978 deals with all outstanding items. Neither party has sought to re-open negotiations since the May 3rd break-off.

7. Mr. Diamond testified that the company refused to amend its position on the issue of union security throughout the negotiations. The evidence establishes that the company initially offered the union voluntary revocable dues check-off and did not alter its position prior to the break-off on May 3rd, the evidence also establishes, however, that during the negotiations the union did not move from its original demand of compulsory membership and check-off for all persons hired after the signing of the agreement and the compulsory deduction of an amount equivalent to union dues for all employees as of the date of signing. The parties filed a number of collective agreements with the Board. The collective

agreement covering the composing room staff between the respondent and the complainant union provides for a closed shop. The recognition clause in the agreement between the Post Publishing Company (A Thomson paper) and the Sydney Typographical union covering editorial employees, provides for the same type of union security as requested by the complainant. The Oshawa Times, also a Thomson paper, provides similar union security. The agreements covering the editorial staff at the Toronto Globe and Mail provides for a voluntary revocable check-off and the agreement covering the editorial staff at Canadian Press provides for voluntary check-off. It is agreed by the parties that only a small minority of editorial employees are presently organized.

8. Mr. Diamond testified that under the terms of the company's wage offer three of the twelve bargaining unit employees would not have received a wage increase. He admitted in cross-examination, however, that two of the three were new hires and the third was a relatively new hire who had limited previous experience. The evidence establishes that these employees would have received a small increase six months after the commencement of the agreement. The parties had agreed that their collective agreement should be for a 1 year term.

9. Article 19.01 of the composing room agreement provides:

"The union reserves the right to its members to refuse to execute all work received from or destined for struck offices, publications or unfair employers where lockouts or strikes recognized or authorized by the International Typographical Union are in effect.

It is not intended that this section apply to advertisements received prior to notice to the Employer of such strike or lockout."

The union filed a letter from the company dated February 22, 1978, dealing with the interpretation of the above clause. The letter reads:

"Mr. J. Buller,
President
Toronto Typographical Union No. 91
430 King Street West
Toronto, Ontario
M5V 1L5

Dear Jim:

Further to our telephone conversation of yesterday, the wording you requested is as follows:

'The Union agrees that in the application of Section 19.01 it is interpreted to apply to Employers other than The Brampton Times.'

As pointed out to your committee on January 3rd, 1978, the above letter of interpretation is to be in the form of a side letter but, as you know, is essential for effecting any agreement.

Yours very truly,
 THOMSON NEWSPAPERS LIMITED
 (sgd.) H.W. Hatton
 Manager – Labour Relations”

10. Mr. Diamond was the only witness called by the union. The company chose not to call evidence.

11. The union concentrated its argument on the company's wage offer and its inflexible position on union security. The union takes the position that the position taken by the company on these matters constitutes “surface bargaining” and a failure to recognize the trade union. Mr. Buller, on behalf of the union, argued that the union could never accept voluntary revocable check-off without signing its death notice. He argued further that the company's wage offer was deliberately divisive and designed to complement its position on union security. He explained that it was not likely that the three employees whose wages were to be frozen under the company's wage proposal would voluntarily consent to the deduction of union dues and thereby decrease their wages. He urged that the failure of the company to agree to the union security clauses sought by the union must be viewed against the fact that the company has agreed to similar language elsewhere including a closed shop for the composing room at the same paper. He asks the Board to take note of the company's letter of February 22nd setting out its interpretation of article 19.01 of the composing room agreement and to draw the inference that the company was preparing for a strike well in advance of the conclusion of bargaining. In the face of company proposals which it argues were tailor made for rejection, the union asks the Board to order the company to table a fair, non-discriminatory wage settlement and to impose a union security provision along the lines of that proposed by the union. The union cited the *Board of Health of Haliburton Kawartha, Pine Ridge District Health Unit* case, [1977] OLRB Rep. Feb. 65 in support of the proposition that the Board will order specific contract terms in remedying a breach of Section 14 of the Act. The union also submitted that the company refused to respond to the union's proposals in any full or meaningful manner or to table full or extensive counter proposals and referred to certain actions of Mr. Wiseman as “deliberately offensive.”

12. Mr. Morley, counsel for the employer, argued that the evidence does not disclose a breach of section 14 of the Act. Having regard to the appointment of a new publisher effective January 1, 1978 and the critical stage of the composing room negotiations at the time of the union's certification for the editorial staff on December 2nd, he argued that the commencement of direct negotiations on January 13 negates any inference that the company was refusing to meet or recognize the trade union. Mr. Morley takes the position that the Board must find on the evidence that the company spent considerable time negotiating with the union and made proposals on all matters in dispute. He reminded the Board that 2 of the 3 employees who would not receive a wage increase on the signing of the agreement were brand new employees and the third was a relatively new employee with very little experience. He dismissed the union's claim that it could not live without a compulsory check-off and reminded the Board that there are few agreements covering editorial room employees and cited the *Globe and Mail* agreement and the *Canadian Press* agreement in support of the position adopted by the company. He further reminded the Board that the union did not move from its initial position on union security. He questioned the motives of the union in publicizing the negotiations and in drawing attention to the issues of wages and union security before they had been fully canvassed. He asked the Board to dismiss the complaint.

13. Section 14 of the Act provides”

“The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.”

The Board has found that the duty operates on two levels. In the context of an emerging bargaining relationship, as is the relationship between the parties to this matter, it serves to reinforce the employer’s obligation to recognize the union. In addition, the duty serves to protect the decision-making framework which is essential to meaningful and informed collective bargaining.

14. The Board, in dealing with allegations of bad faith bargaining, has been careful to recognize the principle of voluntarism which is found in The Labour Relations Act. The legislature has decided that the contents of collective agreements, other than those which are specifically regulated by the statute, should be determined by the parties who must live under and honour them. The statute provides for the use of economic sanction and not interest arbitration as the ultimate means of determining contractual terms. The system, therefore, enshrines the concept of voluntarism and in so doing cannot provide that an agreement will result in every case. It is for this reason that the duty in section 14 of the Act does not require that an agreement be executed but rather that every reasonable effort be made to negotiate a collective agreement and accordingly, as the Board has stated “good faith bargaining cannot be equated to the existence of a collective agreement and conversely, bad faith bargaining cannot be equated to a failure to reach agreement.” In keeping with the policy of the statute the Board has concerned itself with the structure and framework necessary to effective bargaining but has been careful to allow the parties to determine their own bargain. The Board commented on its general approach to these matters in the *DeVilbiss (Canada) Limited* case, [1976] OLRB Rep. Mar. 49 at para. 13 as follows:

“The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective – that of entering into a collective agreement and section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism as reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. There-

fore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions."

(See also re *Journal Publishing Company of Ottawa Limited* case, [1971] OLRB Rep. Nov. 748 at para 12.) *The Board of Health of Haliburton etc.* case (supra) which was cited and relied upon by the union does not depart from the approach of the Board as enunciated above. The Board in that case did not order the employer "to reinstate article XXIII as part of any final settlement" as argued by the union, but found that the employer was entitled to withdraw its offer. Mr. Hodges, in his dissenting opinion, made the order cited by the trade union.

15. We now turn to the main element of the union's complaint. The union claims that the company's wage offer and the inflexible position adopted by it on the issue of union security constitute a form of "surface bargaining." "Surface bargaining", is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between "surface bargaining" and hard bargaining. The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even "predictably unacceptable" is not sufficient, standing alone, to allow the Board to draw an inference of "surface bargaining". This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of "surface" bargaining can be made.

16. Having considered the company's wage offer in relation to the union's proposal on wages, we are constrained to comment that the parties do not appear to be worlds apart. This is not a case where the employer is attempting to cut the wages of its bargaining unit employees. The company's wage offer freezes the wages of three employees at signing. Two of these employees are new hires and the third is a relatively new hire. The employer is entitled to deal with new employees differently and in so far as its wage offer freezes the wages at signing for these persons and fails to otherwise meet the union's demands, it may be unacceptable to the union. It does not, however, support the conclusion that it was calculated to draw a negative response from the union and thereby make agreement impossible.

17. The union claims that the company has coupled its wage offer with an offer of union security which it knows the union cannot accept and which, therefore, is designed to make it impossible to conclude an agreement. Section 36(a) of the Act provides that on written request of the trade union there shall be included in the collective agreement a clause providing for voluntary revocable check-off. An offer of the form of union security provided for in Section 36(a) of the Act cannot be in violation of the Act. This is not to say that an in-

transigent offer of this form of union security coupled with other relevant facts might not cause the Board to conclude in a given case that an employer had failed to bargain in good faith. Even if the Board were to make such a finding, however, it could not impose a form of union security different than that set-out in section 36(a) of the Act. If the Board was to make an order of the type sought by the trade union in this case, it would be ignoring the policy of voluntarism which is embodied in the Act and, having regard to the provisions of Section 36(a), it would be thrusting itself into the role of legislator; a role which it cannot assume.

18. In this case the evidence does not permit the Board to make a finding that the employer has engaged in "surface bargaining" and has, therefore, acted contrary to the requirements of Section 14 of the Act. In this case there is no evidence of the type relied upon by the Board in the *DeVilbiss* case (supra). The employer has a pre-existing bargaining relationship with the applicant union in respect of its composing room employees. The employer did not attempt to deal directly with its employees. There is no pattern or history of anti union conduct. The Board is satisfied that the employer did not conduct itself at the bargaining table in such a way as to undermine the framework necessary to effective bargaining. The employer met with the union on 12 separate occasions, 6 of these in the presence of a mediator. There is no evidence that the employer ever refused to meet. During the course of bargaining the employer tabled a complete set of proposals on all items in dispute. The evidence does not support the conclusion that the employer refused to enter into a full discussion or withheld information necessary to the decision-making capabilities of the union. Even if the company's letter of February 22nd, dealing with the interpretation of article 19.01 of the composing room agreement, could be characterized as a form of strike preparation it would not support an inference of bad faith bargaining. It must be recognized in the context of free collective bargaining that "best" offers are sometimes made in the knowledge that they may not be sufficient to avoid an economic confrontation. In the absence of other evidence the company's wage offer coupled with its unchanging position on the issue of union security do not support a finding of failing to bargain in good faith.

19. Some comment must be made about Mr. Wiseman's conduct at the bargaining table. On a number of occasions he berated and castigated the trade union in harsh terms and in a loud and aggressive manner. Mr. Wiseman's conduct, however, must be viewed in the context of the negotiations. As the Board stated in *The Board of Health of Haliburton etc.* case (supra):

"Words may sometimes betray bargaining in bad faith, but the Board must view the words carefully and in the light of all the surrounding circumstances. Those familiar with collective bargaining know that fighting words are sometimes no more than a form of posturing for desired effect. And at other times they merely reflect the inevitable fact that when people form hard lines on opposite sides of a tough issue tempers will flare, notwithstanding the best of intentions."

In this case the union applied for conciliation services before its first meeting with the employer, chose to publicize the progress of the negotiations through the medium of a non-union competitor and decided to invite observers to the bargaining table who were neither employees of the company nor officials of the union. Mr. Wiseman's outbursts must be viewed against this backdrop of events. In the circumstances the Board does not view Mr.

Wiseman's conduct at the bargaining table as in violation of the duty imposed upon him by Section 14 of the Act.

20. The Board characterizes the dispute between the parties as one relating to the content or the ultimate result of their negotiations. The lack of agreement in the circumstances of this case evidences the existence of hard bargaining but it does not support a finding of "surface bargaining". The evidence does not support a finding of failing to bargain in good faith and make every effort to make a collective agreement.

21. Having regard to all of the foregoing this complaint is hereby dismissed.

DECISION OF BOARD MEMBER W.F. RUTHERFORD:

1. While most of the facts as stated in the Board's decision are essentially correct, the conclusions in my opinion, do not reflect the important questions raised by the Union.

2. The union involved was certified on December 2, 1977. Direct negotiations after this certification commenced on January 13, 1978. Some 12 meetings took place; the last six involved a mediator. It is the union's contention that during this period no meaningful bargaining took place on major issues. In two issues – Union Security and Wages – it is alleged that the submissions by the Company amounted to "surface bargaining", that is, bargaining without any real intention of concluding a collective agreement. During the meeting on the 12th of June the union stated that three employees would receive no wage increases at the time of signing. This was admitted by the Company Counsel who further suggested, two were new employees and the other relatively new with little experience.

3. The second point raised by the union was the question of Union Security. In this instance we have a new unit of 12 employees employed by a multi-national newspaper chain known as (Thompson Newspapers Ltd.). The union proposed a mild form of Union Security clause that is similar to that in the Oshawa Newspaper Guild agreement. The union did not press for the closed union clause of the back shop of the same establishment. The union's position was flexible, while the company proposals amounted to an open shop agreement.

4. The union's position before the Board was that all other major proposals by the Company (including wages and the company proposals on Union Security) were merely surface bargaining – that the company were intentionally making proposals that the union could not accept. As a result, although previously certified on December 2, 1977, it could as a possibility be without a union by December 2, 1978. The employer could undermine the union's support by merely hiring employees who it knew opposed the union.

5. Section 14 of the Act requires the parties to meet within 15 days of giving notice, and make a reasonable effort to make a collective agreement. These two important words – "reasonable effort" – have not been given sufficient consideration by the company. I do not believe the employer has made a reasonable effort in this case.

6. It is significant that the company counsel presented the Globe and Mail contract and two Thomson Paper American agreements that contained open shop union membership, but did not submit one Thomson Paper Canadian contract, all of which have at the minimum the proposal of the union to the Brampton Daily Times on Union Security.

7. In my opinion Section 14 of The Ontario Labour Relations Act is particularly important as applied to first agreements. The Board should apply Section 14 so as to prevent Anti-union Corporations whose employees have been certified from escaping their responsibility to bargain in good faith. The Board must ensure that there is the intention to reach a fair settlement, thereby preventing the employer from eventually eliminating the union. It is well known that bargaining for a first agreement is especially difficult, and often a union duly certified is never able to achieve a first agreement. Indeed, this is exactly what happened in the *DeVilbiss* case cited by the majority – notwithstanding the Board's finding in that case that there were numerous breaches of Section 14 of the Act.

8. I am not proposing in the instant case that the Board should take over the negotiations. My proposal is that the Board should direct the two parties to return to meaningful negotiations to arrive at a settlement that could be presented to the membership. I would retain jurisdiction to entertain a further application in the event that this order does not result in meaningful negotiation.

0008-78-R Labourers' International Union of North America, Local 506, (Applicant), v. **Diplock Durable Floor Co. Ltd.**, (Respondent), v. The General Contractors' Section of the Toronto Construction Association, (Intervener #1), v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener #2).

Certification – Prehearing Vote – Membership Evidence – Two faulty cards filed by organizer who also witnessed a number of other cards – Application dismissed

BEFORE: N.B. Satterfield, Vice-Chairman, and Board Members J.D. Bell and M.J. Fenwick.

APPEARANCES: *A.M. Minsky for the applicant; no one for the respondent; no one for intervener #1; H.M. Pollit, Giovanni Balanzin and Claudio Migotto for intervener #2.*

DECISION OF THE BOARD: July 10, 1978

1. The matter before this Board arises out of an application for certification requesting a pre-hearing representation vote. It is an application for certification within the meaning of section 108 of The Labour Relations Act. The specific issue concerns the membership evidence filed in support of the application. A routine clerical check of the membership evidence revealed circumstances which led the Board to appoint an Examiner to inquire into three of the cards filed. Following this enquiry, the Board, in its decision issued May 1, 1978, directed that a pre-hearing representation vote be taken, the ballots of the three employees for whom the cards were filed to be segregated, the ballot box to be sealed and the application put on for hearing in order to examine into the membership documents in question. This hearing was held June 30, 1978 and after hearing preliminary representations from the parties, the Board gave its decision orally to dismiss the application with the written reasons therefor to follow.

2. Prior to the hearing, the Board received a request in writing from the applicant through its counsel requesting permission to withdraw the membership evidence filed with respect to two of the three employees. The Board, in dealing at the hearing with this request, received the admission of the applicant, through its counsel, that there were irregularities with respect to the membership cards filed for the two employees, but these irregularities were entirely innocent and without intent to mislead the Board. The applicant acknowledged that the organizer who witnessed the two faulty cards was witness also to a majority of the cards filed. Specifically, his signature appears on nine of the eleven cards filed with the Board and on six of the seven cards considered in respect to the application, one of which was a card admitted by the applicant to be of an irregular nature.

3. The Board has, in many instances where it has been dealing with membership evidence problems, stressed the need for it to insist on the highest standards of integrity on the part of the persons who submit such evidence because that evidence usually is not subject to examination by the parties and because the Board customarily accepts it at its face value, subject to a check of employees' signatures thereon with specimen signatures of the same employees supplied by the employer. In this respect see *Webster Air Equipment Company Ltd.*, 58 CLLC ¶18,110 at pp. 1717 and 1718. The Board has particular concern in cases of pre-hearing representation votes, because the very nature of this procedure usually does not result in a hearing at which the parties have an opportunity to raise challenges to membership evidence. In *Webster Air Equipment Company Ltd.* (supra) and in many other cases involving irregularities in membership evidence, the Board has held that, even where the membership evidence was obtained by an employee as opposed to an official of the trade union involved, all of the membership evidence obtained by that employee responsible for the irregular card is dismissed by the Board. In the case before this Board, it is clear that the person who obtained the membership evidence in question is an official of the applicant trade union.

4. Having regard for all of the circumstances before it, the Board finds that all of the cards filed in evidence by the applicant, which were witnessed by its official who also witnessed the irregular card, are inadmissible.

5. Therefore, the Board further finds that not more than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

6. The application is, therefore, dismissed.

The Registrar will destroy the ballots case in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

1934-77-U International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant), v. **Fleck Manufacturing Company**, Grant Turner, Bill McIntyre, Bill Freeth, Ray Glover and Jack Riddell, (Respondents).

Consent to Prosecute – Application to prosecute certain management persons, a member of the legislature and members of the police force for their conduct in connection with an organizing campaign and labour dispute – Board found *prima facie* case and granted consent

BEFORE: M.G. Picher, Vice-Chairman, and Board Members F.W. Murray and O. Hodges.

DECISION OF M.G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES; July 20, 1978

1. This is an application under section 90 of The Labour Relations Act asking for the Board's consent to prosecute the respondents for alleged offences under the Act. The applicant (hereinafter referred to as the "UAW") maintains that each of the respondents breached the Act by their actions in relation to the current strike at the Huron Park plant of the respondent Fleck Manufacturing Company (hereinafter referred to as "Fleck"). This case raises a number of issues relating to the extent to which trade union organization is protected by The Labour Relations Act.

2. On an application for consent to prosecute the function of the Board is to determine whether the evidence discloses a *prima facie* case against the respondents, raising arguable points of law appropriate for consideration by the Provincial Court. In performing this function the Board must be convinced not only that there is some evidence to support the prosecution but also that a prosecution would serve the interests of the bargaining relationship between the parties or generally advance the interests of collective bargaining in the Province.

3. The Board will, therefore, first review the evidence to find whether a *prima facie* case has been made out against each respondent and will turn lastly to consider, if such a case is established, whether it would serve the interests of industrial relations to grant consent to prosecute. It should be emphasized that in reviewing the evidence the Board does not make any final findings of fact nor does it make any ultimate determination as against any of the respondents. That is the exclusive function of the Court.

4. Fleck is engaged in the manufacture of electrical harnesses for motor vehicles at its plant in Huron Park. It is a matter of record that in September of 1977 the UAW applied to be certified as exclusive bargaining agent of a unit comprising some 146 employees in the plant. The application was heard on October 17, 1977 and at that time the Board determined that the UAW had submitted valid membership evidence for 117 of the employees in the proposed bargaining unit. By its certificate dated October 20, 1977, the Board granted to the UAW exclusive bargaining rights for all employees of Fleck Manufacturing Company in Huron Park, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed less than 24 hours per week and students employed during the school vacation period.

5. There is evidence before the Board that within four weeks of the issuing of the Board's certificate Fleck caused a notice to be posted to the attention of all employees. The evidence is that the notice took the form of a memorandum from Fred Berlet, the President of the company, and that it read, in part, as follows:

I can't stress too much how important it is for all of us to work together to strengthen our jobs. I have on many occasions before stated our company's policy on Unions, but I think it can stand repeating again at this time.

'The management and supervision of Fleck prefer to deal with our people directly rather than through a *third party*. This is a non-union organization. It always has been, and it is certainly our desire that it always be that way. This does not mean from time to time we do not have problems. However, we have always been able to work these out among ourselves without the intervention of outsiders.

No plant is free from day to-day problems, but we believe our published policies and our practices help to resolve problems rather than fight with each other. Unions have never gotten anyone his job, neither have they caused anyone to keep his job. Only each of us working together to make Fleck a viable, healthy business can do that. We encourage you to bring your problems to your supervisor or to anyone else you feel can help you. We, in turn promise to listen and give the best possible response we can.

In our troubled times there are many pressures. We want to keep our plant free from artificially created tensions that can be brought on by the actions of outsiders such as a union. We feel that a union would be of no advantage to any of us. It would hurt the business on which we all depend for our living. We accept our responsibility to provide the best working conditions, pay, and benefits that we can afford. It is not necessary for you to pay union dues to receive fair treatment at Fleck. Each of you is an individual and you have the right to speak for yourself.'

6. There is evidence that the employer posted the above notice some three weeks after it had received notification from the certified union that it wished to meet with the employer and bargain with a view to making a collective agreement. Moreover, there is evidence that it was posted shortly after the employer had received the first written proposals for a collective agreement which had been forwarded to the employer by the union on or about November 11, 1977.

7. Evidence was adduced that the representatives of the union and the employer met on seven different occasions between December 2, 1977 and March 3, 1978 to bargain. While the evidence discloses movement in a number of the positions of both parties, it also appears that hard and divergent positions were taken with respect to union security and wages.

8. On January 24, 1978, the UAW requested the appointment of a conciliation officer. A strike vote was successfully taken among the members of the bargaining unit on February 4, 1978. On February 9, 1978, the parties met with the conciliation officer appointed by the Minister of Labour and on February 16, 1978 the Minister issued a "no Board" report.
9. Mr. Al Seymour, the International Representative of the UAW, who acted as its chief negotiator with the representatives of Fleck, testified that on February 21, 1978, he advised the chief negotiator for the company that the union had decided on a strike deadline of March 6, 1978.
10. Testimony was given before the Board that during February there was growing feeling among the employees and management in the plant respecting the impending strike. There is further evidence that in the third week of February, the respondent William McIntyre was observed entering the plant by Miss Mary Lou Richard, an employee and a member of the union's bargaining committee. The respondent McIntyre is a Constable with the Ontario Provincial Police, Exeter Detachment. The evidence of Constable McIntyre is that he attended at the plant solely for the purpose of arranging for the transportation of a member of the plant personnel who was to be a witness in criminal proceedings unrelated to the bargaining dispute. He did not testify to having any conversation with members of management at that time in relation to the coming strike.
11. The evidence of Mary Lou Richard, however, is that on the same day that Constable McIntyre visited the plant she was approached by the respondent Grant Turner, Vice-President of Fleck, at her work-place and that he asked her why it was that the Ontario Provincial Police were afraid of her. She testified that when she then asked Turner whether he was referring to the respondent McIntyre, he replied that he was and that he went on to say that Constable McIntyre would be on the picket line on the first morning of the strike and that he would "get her". She testified that in a later exchange that day Mr. Turner further commented that bus transportation would be arranged to bring employees to work during the strike and that Bob McNall, a stock-man in shipping and receiving at the plant, would come through the picket line with a baseball bat.
12. Considerable evidence was adduced with respect to the events of Friday, March 3, 1978, the last day of work before the strike date of Monday, March 6, 1978. The evidence is that that day saw the last bargaining meeting between the parties before the strike because it was then that negotiations broke down, principally over the issues of union security and wages.
13. There is evidence that at approximately 2:00 p.m. on that day the entire day shift in the plant, consisting of some 90 employees, was ordered by management to cease work and go the lunchroom.
14. The evidence is that the assembled employees were there addressed by the respondent Grant Turner who introduced the respondents Constable McIntyre and Corporal Freeth with the comment that he thought that it was "high time to bring in the Ontario Provincial Police to clear the air" in the light of intimidation that had been occurring among the employees in relation to the strike. The evidence is that Corporal Freeth was in uniform and that Constable McIntyre, a plain clothes criminal investigator, was not. According to

the evidence the employees were then addressed for some ten or fifteen minutes by Constable McIntyre.

15. The uncontradicted evidence of a number of employees and of Constable McIntyre is that he read to them portions of the Ontario Provincial Police In-Training Manual on strikes and added his own comments and explanations. Constable McIntyre's evidence is that he read sections 381(1) and 382 of the Criminal Code from the manual. The first section makes it an offence for an employee to engage in violence, threats or intimidation in the furtherance of a strike. The second section which he read makes it unlawful for an employer to discharge, intimidate or threaten employees to compel them to abstain from belonging to a trade union. According to Constable McIntyre he omitted section 381(2), the section of the Criminal Code which provides that employees may lawfully engage in peaceful picketing for the purpose of conveying information.

16. According to his own testimony, Constable McIntyre informed the employees of provisions of the Criminal Code relating to the possession of weapons. His evidence was that he advised the assembled employees that he had heard of the intention of some to carry weapons during the strike and that he then told them that not only would the carrying of knives and guns be an offence against the weapons provisions of the Criminal Code but also that two-by-fours and baseball bats could be considered unlawful weapons, the possession of which could result in imprisonment for five years and a criminal record for life. It is also Constable McIntyre's evidence that during the course of his talk he stated that he had himself seen a case of intimidation.

17. There is no evidence of Corporal Freeth's having participated in the meeting beyond the fact that he was present, in uniform, and that he responded to one question by advising the employees which parts of Huron Park were public and which parts were private property.

18. The evidence indicates that after their talk the respondents McIntyre and Freeth left the lunchroom and that the employees were then addressed by the Company's vice-president, Grant Turner.

19. The evidence of a number of employees is that Mr. Turner stated at that time that negotiations between Fleck and the UAW had broken off and that union representative Al Seymour had "ripped up the contract." There is evidence that he then charged that Mr. Seymour did not want the employees to know the contents of the company's offer. According to the evidence before the Board he then stated that employees lose their personal rights when represented by a union, that no union ever got anyone a job nor kept anyone's job for him and that if there were no union he would be happy to deal with the problems of employees, including health and safety complaints, on a personal basis.

20. The testimony of employees in attendance is that Mr. Turner further stated that the plant had lost some orders because of unionization and that for all he knew the UAW had organized Fleck in collusion with Essex Wire, a competitor of Fleck, in a deliberate attempt to cause financial harm to the company.

21. There is additional evidence that the vice-president of the company then went on to say that as far as he was concerned the employees did not have a union and would not

have one until there was a signed contract. The evidence of employees before the Board is that Mr. Turner then added that he had made commitments to employees that they would never be required to pay union dues and that he would never concede on the issue of union security.

22. There is evidence that he then said that in the strike vote taken on February 4, 1978, the union had done most of the voting for the employees. There is evidence that some questions were asked and statements were made by employees and that towards the conclusion of his talk Mr. Turner told the assembled employees that if they went to the picket line or to the pre-strike meeting scheduled by the union for the following Sunday he could not guarantee their jobs and that in six months they probably would not be employed in the Fleck plant.

23. The evidence of the employees who testified before the Board is that the meeting had a strong and immediate impact upon the employees. There is evidence that the meeting instilled substantial confusion and doubt among employees who had previously intended to support the strike.

24. The Board also heard evidence that management held a second compulsory meeting for the purpose of addressing the 30 or so employees of the night shift. According to testimony Mr. Turner addressed that meeting in the company of Ray Lacourse, the plant manager, and Bob McNall, the stock-man. The evidence is that there were no police present at that meeting but that Mr. Turner told the assembled employees of the earlier attendance at the plant by the respondents McIntyre and Freeth, stated that some of the employees who had indicated a desire to come to work during the strike had been threatened and that he had made arrangements with Constable McIntyre and Corporal Freeth to escort employees who wished to work across the picket line. Testimony was given before the Board that he told the employees that if Fleck lost work to Essex Wire because of the strike it would probably be necessary to close the plant. There is evidence that he also stated that if they did strike he could not guarantee that their jobs would be there when the strike was over and that he had 100 applications from persons willing to replace employees that did go on strike.

25. The evidence is that Mr. Turner concluded the meeting at approximately 8:30 p.m. and then allowed the employees to go home early, with pay, rather than complete their regularly scheduled shift until midnight. There is additional evidence that later that evening Mr. Turner was observed drinking at a local pub known as the "Albatross Club" in the company of René Lalonde, an employee. There is evidence before the Board that a week earlier Mr. Lalonde had circulated among employees during working hours asking employees to sign a paper saying that they would be willing to cross the picket line. According to the evidence he then told employees that arrangements had been made for police protection.

26. Neither Mr. Turner nor the respondent Fleck Manufacturing Company called any evidence to rebut or to explain any of the testimony related above.

27. The Board will now deal with the evidence as it relates to the respondent Fleck Manufacturing Company and its vice-president, Grant Turner in the light of their obligations under The Labour Relations Act. The relevant sections are as follows:

14. The parties shall meet ... and they shall bargain in good faith and make a collective agreement.

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

28. Employers and persons acting on their behalf are compelled at all times by section 56 of The Labour Relations Act to refrain from interfering with the representation of their employees by a trade union. And at all times employers, persons acting on behalf of employers and indeed, all persons are prohibited by section 61 of the Act from seeking by intimidation or coercion to compel any employee to cease to be a member of a union or to refrain from exercising his or her rights under The Labour Relations Act. Those rights necessarily include the right to be represented by a certified bargaining agent and the right to engage in a lawful strike.

29. When a Board certificate has been issued to a union, section 14 of the Act compels the employer to recognize the certified union as the sole and legitimate bargaining agent of all of the employees in the bargaining unit, and, upon receipt of the appropriate notice, to meet with the union and bargain in good faith, making every reasonable effort to conclude a collective agreement.

30. These statutory protections of the rights of employees do not mean that an employer and persons acting on behalf of an employer have no scope to express their point of view. Section 56 of the Act expressly allows employers to express their views so long as they do not use coercion, intimidation, threats, promises or undue influence.

31. By the enactment of sections 56 and 61 of the Act the Legislature has recognized that employees are particularly vulnerable to statements by an employer which tend to threaten their job security. Threats to employees that they will lose their jobs if they attempt to exercise their rights under The Labour Relations Act, including the right to strike, can drastically curtail employees' freedom of choice and undermine the legitimate interests of their union.

32. At issue here is whether the applicant has established at least a *prima facie* case that these two respondents have gone beyond the bounds of acceptable employer conduct and have violated sections 14, 56 and 61 of The Labour Relations Act.

33. Having regard to all of the evidence, the Board finds for the following reasons that the evidence adduced is sufficient to establish a *prima facie* case of breaches of sections 14, 56 and 61 of The Labour Relations Act by the respondent Fleck Manufacturing Company and breaches of sections 56 and 61 of the Act by its vice-president, Grant Turner.

34. The principal evidence against the respondents Fleck and Turner is to be found in the two lunchroom meetings of March 3, 1978. Words necessarily take their meaning and force from the circumstances in which they are used. The Board must therefore view the evidence of Mr. Turner's words in the light of the evidence of events in the days and weeks immediately preceding the meetings of March 3, 1978. Apart from the evidence of the message from the company's president respecting Fleck's policy on unions, there is evidence that Mr. Turner had in the past made statements to the effect that there would not be a union in the plant as long as he was there. There is evidence also that two years ago Fleck's application form for employment required the applicant to indicate whether he or she was or had ever been a member of a trade union. If so, the applicant was required to disclose details as to the time and place of membership and of participation in a strike, if any.

35. There is also the evidence that on February 24, 1978, a few days after Constable McIntyre's earlier visit to the plant and one week before the compulsory meetings in the lunchroom, René Lalonde, a set-up man in the plant, who has been seen as a social companion of the company's vice-president, circulated among employees at their work stations. There is evidence that he asked them to indicate by signing a document whether they would be available for work and willing to cross the picket line during the strike, and assured them that there would be police protection to and from the plant for employees who did not wish to strike.

36. Viewed in that context, the evidence of Mr. Turner's words in the lunchroom meetings about the union and job security is, in the Board's view, evidence upon which a Court could find that Fleck and its vice-president unlawfully threatened and intimidated the employees and unlawfully interfered with the exercise of their rights under The Labour Relations Act.

37. It is in the light of all of this evidence that the Board must also assess the evidence of the quality of bargaining conducted by Fleck. There is evidence that the company, through Mr. Turner, repeatedly asserted to both the union and the employees that it had made separate commitments to individual employees that they would never be required to join the union or to pay union dues. There is evidence consistent with the evidence in Mr. Berlet's memorandum, that Fleck continued to view the employees as individuals with whom it could make and maintain individual bargains with respect to terms and conditions of employment such as union security. There is, in other words, evidence that the company failed to deal exclusively with the union in the negotiation of that issue.

38. And while there is evidence of bargaining with the representatives of the trade union, that bargaining must be viewed in its context. The quality of bargaining can be tainted by contemporaneous unfair labour practices. In this case the evidence of Fleck's posture at the bargaining table cannot be divorced from the evidence of the posture taken by the employer in both the November memorandum of Mr. Berlet and the two captive audience speeches given by Mr. Turner. The Board cannot view the evidence of the bargaining without regard to the evidence from which a Court could infer unlawful threats, intimidation,

promises and undue influence by the employer. Nor can it evaluate evidence as to the quality of bargaining in isolation from the evidence of attempts by Fleck to negotiate a separate understanding with its employees in apparent disregard of the exclusive bargaining rights of the union that lawfully represents them. There is evidence, therefore, to support a finding that Fleck has not fulfilled its duty to fully recognize the union and to bargain with it in good faith.

39. The Board will deal next with the application for consent to prosecute the respondent police officers William McIntyre, William Freeth and Raymond Glover.

40. The evidence is that police forces in this Province tend to maintain a measured and impartial response during any heated labour dispute and to stay their presence until the picket line has become a reality. That policy reflects the prudence of police in avoiding undue identification with either the union or the employer and averts the danger of peace officers being enlisted, knowingly or unknowingly, in the cause of either side in a labour dispute.

41. Obviously police officers must have some latitude to respond in situations of industrial relations unrest without being unduly fettered by gratuitous accusations of intimidation and interference with the rights of collective bargaining. Thus in any case where breaches of The Labour Relations Act are alleged against police officers consideration must be given to the delicate nature of their position and to the weight of their responsibilities.

42. It is also true, however; that police officers must exercise their responsibilities within the law. And in matters of labour relations, they must not do so in disregard of The Labour Relations Act. As difficult as their task may be they must remain sensitive to the rights of employees. The standard of what is permissible to a police officer within The Labour Relations Act must necessarily depend upon the particular facts of each case.

43. The Board does not find that a *prima facie* case of breaches of The Labour Relations Act has been made out against the respondents Raymond Glover and William Freeth. The evidence is that on the morning of March 3, 1978, Sergeant Glover was approached in the detachment office by Constable McIntyre who stated that he had information regarding instances of intimidation and threats to obstruct a public highway in relation to a strike at Huron Park and that the employer had requested that representatives of the police attend at the plant to advise the plant personnel of their rights and obligations under the law. The evidence is that on the strength of the representations of Constable McIntyre, Sergeant Glover gave his permission to Constable McIntyre to speak at the plant. There is evidence before the Board that Sergeant Glover instructed Constable McIntyre to take Corporal Freeth with him because the latter was in uniform and that he instructed both men that all persons at the plant should be spoken to. With respect to Corporal Freeth, therefore, the evidence is merely that he accompanied Constable McIntyre, attended his address to the employees and made only a brief statement as to which parts of Huron Park were public and which were private property.

44. There is nothing in the evidence to suggest that in responding to the request communicated by Constable McIntyre, Sergeant Glover or Corporal Freeth knew of had any reason to suspect that they might be contributing to the intimidation of the employees or in any way furthering an unfair labour practice on the part of the employer. The evidence is

consistent with their having acted out of concern for the preservation of the peace and there is no substantial evidence from which it could be inferred that Sergeant Glover or Corporal Freeth sought to intimidate, coerce or compel any of the employees to refrain from exercising any of their rights under The Labour Relations Act. The application for consent to prosecute the respondents William Freeth and Raymond Glover is therefore denied.

45. As regards the three respondent police officers, it is the position of Constable McIntyre that has given the Board the greatest concern. The evidence before the Board in this case raises serious questions as to whether Constable McIntyre has exceeded the bounds of what may be permissible under the Act. There is evidence from which a Court could infer that he has overreached his authority and participated in activities which the Board has determined to be *prima facie* evidence of unfair labour practices by the employer.

46. On the morning of March 3, 1978, Constable McIntyre attended at the Fleck plant at the invitation of Mr. Ray Lacourse, the plant manager. There is evidence that he was then told by representatives of management that the plant was a camp divided over the issue of the upcoming strike and that threats and intimidation had occurred among the employees. The evidence of Constable McIntyre is that while he was speaking with representatives of the employer in their office, a female employee in tears came to speak to Mr. Lacourse and Mr. Turner who then left the room. Constable McIntyre testified that he was left alone with Bob McNall who commented to him that he was going to come through the picket line with a baseball bat. His evidence is that he then advised McNall of the unlawfulness of that course of action. He testified that Mr. Turner then returned to the room and stated that the crying employee had been the victim in another case of intimidation.

47. By his own testimony Constable McIntyre did not undertake any investigation to determine the truth of Mr. Turner's assertion respecting the crying employee or to substantiate any further the presence of hostility or the talk of threats and weapons among the employees.

48. The evidence before the Board is that on the strength of one statement by Mr. McNall and the single crying incident that he had witnessed but not investigated, Constable McIntyre was willing to tell an audience of 90 employees that he had seen instances of intimidation and the threat to use weapons on the picket line on the coming Monday, and, further, was willing to couple that comment with a description of the possible consequences of imprisonment for five years and a criminal record for life.

49. Moreover, there is the evidence of Mary Lou Richard that she and Mr. Turner occasionally baited each other and that some two weeks prior, when Constable McIntyre had visited the plant, Mr. Turner pointedly said to her that there would be police on the picket line, that Constable McIntyre would "get her" and that Bob McNall would come through the picket line with a baseball bat. The evidence is that she took those comments seriously enough that she went to the O.P.P. detachment office a few days later and inquired whether police were entitled to work for an employer during a strike and whether, during a strike, an employer could hire a bus to transport non-striking workers.

50. And while the evidence is that Constable McIntyre was instructed by Sergeant Glover to speak to all of the personnel at the plant and that Constable McIntyre was aware that Fleck used a night shift, it appears that he made no attempt to ascertain from Mr.

Turner or Mr. Lacourse whether there were employees on a night shift who should also be advised of their rights. That evidence raises some question as to whether his true concern was to provide information to all of the employees.

51. In view of all of the above, the Board finds that there is evidence to establish a *prima facie* case for the consideration of the Court as to whether Constable McIntyre has breached sections 56 and 61 of The Labour Relations Act.

52. Counsel for the respondent McIntyre submits that the Board is without jurisdiction to make any determination or to grant any consent in respect of Constable McIntyre. He bases that submission on the wording of section 2(d) of The Labour Relations Act. Section 2 of the Act provides as follows:

2. This Act does not apply,
 - (a) to a domestic employed in a private home;
 - (b) to a person employed in agriculture, hunting or trapping;
 - (c) to a person, other than an employee of a municipality or a person employed in silvaculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;
 - (d) to a member of a police force within the meaning of *The Police Act*;
 - (e) to a full-time fire fighter within the meaning of *The Fire Departments Act*; or
 - (f) to a teacher as defined in *The School Boards and Teachers Collective Negotiations Act*, 1975, except as provided in that Act.

53. Counsel for Constable McIntyre argues that section 2(d) must be interpreted literally and that as a member of a police force within the meaning of the Police Act, the respondent McIntyre is not subject to the duties and obligations imposed upon other citizens by The Labour Relations Act and that he cannot be accountable before this Board for actions, which, if committed by another person, might be viewed as breaches of the Act.

54. The Board cannot agree that it has no jurisdiction whatever to deal with the conduct of police officers as it relates to matters of labour relations. The parts of section 2 of the Act must be read in their context. The section sets out certain classes of persons who are excluded from the protection of the Act either because they are covered by other collective bargaining statutes or because the Legislature does not consider collective bargaining to be appropriate in the sector of the economy in which they are employed. The Legislature did not anticipate or intend by section 2 of The Labour Relations Act that a domestic servant, a trapper, a policeman or a teacher might with impunity seek to interfere with the rights of employees or employers and their organizations or to further the unfair labour practices of a union or an employer. Any opposite inference would, in our view, be contrary to the purpose and meaning of the Act.

55. We turn now to the application respecting the respondent Jack Riddell. Mr. Riddell is a member of the Legislature of Ontario representing the riding of Huron-Middlesex, where the Fleck plant is located.

56. At the initial hearing counsel for Mr. Riddell submitted that the Board was without jurisdiction to hear the case against his client by virtue of the provisions of sections 37 and 38 of The Legislative Assembly Act. By its decision dated May 2, 1978, the Board determined that its jurisdiction respecting the respondent Riddell was not ousted by section 38 of The Legislative Assembly Act. With the agreement of counsel for Mr. Riddell it then deferred a determination as to the effect of section 37 of that Act until the conclusion of its hearing evidence.

57. Section 37 of The Legislative Assembly Act provides as follows:

37. A member of the Assembly is not liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before the Assembly or a committee thereof.

Having careful regard to the evidence before the Board, we are satisfied that that section has no application in this case. There is no evidence that any of the statements adduced in evidence as those of Mr. Riddell were made other than outside the Legislature or outside the proceedings of any committee of the Legislature. Moreover, there was neither evidence adduced on behalf of Mr. Riddell nor argument made by his counsel to establish that the statements outside the Legislature attributed to him were in any way inextricably related to his endeavours before the Assembly or any of its committees so as to attract the protection of section 37, if indeed its protection could be said to extend that far.

58. The Board turns to the merits of the application against Mr. Riddell. There is evidence that early in the strike, in an interview with CBC journalist David Schatzky aired on radio station CBL, Toronto, at approximately 9:00 a.m. on Wednesday, March 15, 1978, Mr. Riddell stated that the UAW did not have the support of the majority of Fleck's workers and that it had obtained its bargaining rights by what would amount to a fraud on the employees and on this Board. There is evidence that Mr. Riddell made statements to the same effect elsewhere outside the Legislature and that his statements that the UAW had used devious methods and threats to get workers at the Fleck plant to join the union and to go on strike were quoted in the London Free Press on March 15, 1978.

59. There is further evidence that during the same period of time Mr. Riddell was interviewed on the 6:00 p.m. news of television station CFPO, London, and during the course of that interview stated that employees had been intimidated into signing membership cards in the UAW. There is no evidence before the Board to substantiate any of those allegations against the union.

60. The Board also heard evidence that on March 20, 1978, the respondent Riddell entered the Fleck plant at Huron Park at approximately 10:20 a.m. and that at 11:00 a.m. he emerged from the plant, went to the picket line and spoke to the employees there. There is evidence that he stated that Grant Turner had requested that he speak to the employees

and that Mr. Riddell then asked the striking employees if they wanted the plant to shut down. There is testimony before the Board that he went on to say that he knew Jim Fleck well, that Mr. Fleck owns three plants, one in Huron Park, one in Tillsonburg and one in Eastern Ontario and that if Mr. Fleck was to be the subject of any further harassment in the Legislature that he would shut the plant down. There is evidence that he further stated that if the plant did close down and the employees came to him for jobs, he would have to say "no" to them.

61. It is not uncommon for persons holding political office to take strong positions on matters of labour relations policy and to take strong positions in particular industrial disputes. In so doing it is not uncommon for them to take sides and to do so with deep conviction. It would be unrealistic, and indeed undesirable, to expect persons in political life to adopt an apolitical attitude to all industrial disputes or to always display the dispassionate face of the mediator.

62. But as with employees, employers and indeed all citizens, the freedom of expression enjoyed by members of the Legislature outside the House is not absolute. It is no more lawful for a holder of public office, albeit out of a deeply felt concern for his constituency, to convey on the part of an employer statements that threaten, intimidate and unduly influence employees to fear for their job security and thereby refrain from exercising their rights under the Act, than it is for a member of the Legislature, under the guise of free speech and out of an equal concern for his constituents, to incite employees to participate in an unlawful strike against their employer.

63. in this case, having particular regard to the evidence of statements made by Mr. Riddell to employees on the picket line, which statements may arguably be viewed by the Court as the conveying of threats to the job security of those employees on behalf of Fleck, thereby interfering with the exercise of their rights under The Labour Relations Act, the Board finds that there is established in evidence a *prima facie* case of a breach of section 56 of the Act by the respondent Jack Riddell.

64. The Board now turns to consider whether it should exercise its discretion to grant its consent to prosecute the respondents against whom a *prima facie* case has been established. The question is whether the collective bargaining relationship between the parties or the interests of collective bargaining in the Province would be served by recourse to that form of redress.

65. In the Board's view this is not a frivolous application. The evidence before the Board poses serious questions as to the scope of the rule of law in labour relations and the extent to which the Legislature has protected the rights of employees to pursue their rights under The Labour Relations Act free from unlawful interference.

66. The Board's greatest concern comes from evidence relating to the employer Fleck Manufacturing Company and its vice-president, Grant Turner. The Board must take into account the evidence of the company's history of admittedly strong antipathy to unions, the evidence of its continuing intransigence in that regard as demonstrated in the memorandum of Mr. Berlet, coming as it did after certification of the union, and the evidence of separate entreaties to the employees and threats to their job security by the company's vice-president, Grant Turner. All of that evidence might reasonably be viewed as establishing on the

part of Fleck and its vice-president a deliberate and concerted attempt to interfere with the representation of the employees by a trade union and may well, in the eyes of a criminal court, be seen as reflective of an intention to destroy their union within the Fleck plant at Huron Park.

67. Considering the apparent depth of determination on the part of the employer suggested by the evidence before it, the Board is not persuaded that this case would be better served by any alternative form or redress directed to the employer under The Labour Relations Act. The Board therefore grants its consent to prosecute the respondent Fleck Manufacturing Company for breaches of sections 14, 56 and 61 of The Labour Relations Act and consents also to the prosecution of the respondent Grant Turner for breaches of sections 56 and 61 of the Act.

68. The Board has a serious concern as well with whether Constable McIntyre's actions on March 3, 1978 exceeded the lawful bounds of his authority as a police officer, interfered with the rights of employees and ultimately inflamed a potentially explosive industrial dispute. Insofar as the Board must be concerned about the interests of orderly collective bargaining generally in the Province, its concern is heightened by comments in evidence by the police officers that they would without hesitation again do what they did in respect of the compulsory speech to the employees on March 3, 1978 in the event of a similar invitation in the future.

69. In our view, therefore, the whole of the evidence justifies submitting the evidence respecting the acts of Constable McIntyre for the examination of the Court for its interpretation of sections 56 and 61 of The Labour Relations Act as it applies to his actions. The Board hereby grants its consent to the prosecution of the respondent William McIntyre for breaches of sections 56 and 61 of The Labour Relations Act.

70. The Board also feels that the interests of labour relations in the Province would be well served by a clarification by the Court of the extent to which employees are protected from interference with their rights of collective bargaining in circumstances such as the intervention of the respondent Jack Riddell, as the evidence of his intervention appears before the Board. While the evidence as to his conduct manifestly raises issues of labour relations it also raises, by virtue of Mr. Riddell's elective office, issues that transcend the scope of The Labour Relations Act and which should have the benefit of the scrutiny of the Court. The Board therefore grants its consent to prosecute the respondent Jack Riddell for the breach of section 56 of The Labour Relations Act.

DECISION OF F.W. MURRAY:

1. I dissent in part from the decision of the Majority.

2. In my view the evidence falls far short of disclosing a *prima facie* case of a breach of the duty to bargain in good faith, section 14 of the Act, by the respondent, Fleck Manufacturing Company. The evidence discloses that over the course of seven bargaining sessions, there were a number of concessions made by the respondent, Fleck Manufacturing Company. Of particular significance is the evidence of compromises in the respondent's position on the subject of Management's Rights and Union Security, and the latter point seems to represent the main point of dispute upon which the parties have to date failed to agree.

3. The Board heard evidence as to a number of UAW collective agreements in the Province of Ontario currently in force, in which there was something substantially less than that of a modified Rand Formula Union Security provision. Indeed, it was found in these agreements, membership or dues check-off was not a condition of employment.

4. This evidence dealt solely with agreements in the Province of Ontario and no evidence was adduced concerning this item in other UAW collective agreements in other provinces in Canada or in the United States where these conditions are outlawed in many State Legislatures. This observation is made in the light of the fact that the Board refers to American jurisprudence in a number of cases coming before the Board.

5. Indeed the evidence was to the contrary, namely that the UAW had failed to make any compromise from its original demands on Union Security during the whole of the collective bargaining process.

6. The company's first position on the question of Union Security was to insist on an open shop. The evidence before the Board is that the company substantially moved from that position and at the time of the hearings had proposed a condition embracing a voluntary check-off and voluntary dues for existing employees and a compulsory check-off for new employees. Moreover the Memorandum of Agreement in evidence before the Board also proposed wage rates which reflected a substantial increase from the employer's first position.

7. Accordingly, I would not find that the evidence in any way substantiates a *prima facie* case giving rise to an arguable point of law that Fleck Manufacturing Company did not bargain in good faith and make all reasonable efforts to conclude a collective agreement. It therefore follows that I would not consent to the prosecution of the employer for breaches of section 14 of The Labour Relations Act.

8. I agree with the Majority in finding that there was no *prima facie* case of breaches of The Labour Relations Act made out against Sergeant Raymond Glover and Corporal William Freeth.

9. The conclusion reached on the evidence bearing on the role of Constable McIntyre has caused me concern. During the course of the hearing, evidence from both the employees and from each of the respondents, Corporal Freeth and Sergeant Glover clearly indicated that at least a number of the employees did not know, or were at least confused, as to the role of strikers in mounting a picket line. Indeed the questions asked by the witness, Mary Lou Richard, when she visited the O.P.P. detachment in February clearly indicated that she was not thoroughly aware of her rights or indeed the rights of her employer or those employees who did not wish to strike.

10. From all of the evidence in this case it seems to me that if we are to reduce the threats and possible violence surrounding the mounting of a picket line that some objective method of providing information as to the rights of all of the participants might well be considered where the establishment of a picket line is imminent.

11. When the question was put to Constable McIntyre if he thought now in retrospect if his job would have been more effectively performed had the meeting been held

other than at the company's premises and would it have been better for the O.P.P. to have invited or seen to it that a representative of the union had been invited, the Constable answered "yes". As further evidence of the divergent views on this matter, when Mr. Seymour, the UAW representative was asked the question if he would have attended such a meeting had it been suggested to him, his answer was "no".

12. I could also have concluded from all of the evidence from those employees who gave testimony that had no meeting been held there might well have been more breaches of the law, and a much greater chance of someone being seriously injured.

13. I do not share the Majority's conclusion reached by the Board concerning Constable McIntyre's failure to ascertain if there had been a night shift in his attempts to "speak to all of the personnel in the plant". The evidence indicated that this was a small police detachment covering a relatively large area and a constable could not be expected to know that there was a night shift on, and accordingly from Constable McIntyre's testimony I would have concluded that he honestly believed that he had seen all of the employees when he addressed them in the cafeteria on March 3, 1978. On the other hand Constable McIntyre's failure to make further investigations to determine the extent of the hostility and the talk of threats and weapons amongst the employees it seems to me, left something wanting with respect to a manner in which Constable McIntyre carried out his duties that day.

14. Accordingly, in the light of all of the evidence, I would agree that there has been evidence to establish a *prima facie* case for the consideration of the Court as to whether Constable McIntyre has breached sections 56 and 61 of The Labour Relations Act, and for the same reasons expressed by the Majority in its decision, I would not exercise the Board's discretion to withhold such consent.

15. I would also agree with the Majority in its conclusion that a *prima facie* case had been made to likewise consent to a referral to the Court as to whether the respondents, Fleck Manufacturing Company and Grant Turner breached sections 56 and 61 of The Labour Relations Act and for the same reasons expressed in the Majority's decision, I would not exercise the Board's discretion to withhold such consent.

16. With respect to the respondent, Mr. Jack Riddell, this case is clearly one which, in my opinion, cannot be adequately dealt with by the Board and should be dealt with by the Courts. The whole question as to freedom of speech and particularly freedom of a public representative to speak on issues and express opinions concerning vital issues which may affect his constituents is one that may well transcend labour legislation. Industrial disputes very often take on political overtones and one would have to be blind not to see that this case is fraught on all sides with divergent political opinions.

17. Accordingly, I would agree with the Majority that the Board's discretion should not be withheld and I would grant consent to prosecute the respondent, Jack Riddell, for breach of section 56 of The Labour Relations Act.

**1916-77-R 1915-77-U Retail Clerks Union Local 206,
(Applicant/Complainant), v. Gordons Markets a Division of Zehrmart
Limited, (Respondent).**

Sale of a Business – S-79 – Discharge for Union Activity – Employer arranging with lessor for surrender of lease – Transaction conditional upon second employer entering into similar lease – Both employers related to common parent and negotiations interrelated – Second employer refusing to hire employees because of fear of establishing connection in event of proceedings before Board – Board finding sale and unfair practice.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members W.F. Rutherford and W.H. Wightman.

APPEARANCES: *Alick Ryder and Chuck MacKormick for the applicant/complainant; W.G. Gray Q.C. and R.W. Kitchen for the respondent.*

DECISION OF THE BOARD: July 10, 1978

1. The name: "Gordon's Supermarket Limited" appearing in the style of cause of this application and complaint is amended to read: "Gordons Markets a Division of Zehrmart Limited".
2. The Board directs that the above application and complaint be and the same are hereby consolidated.
3. The applicant, Retail Clerks Union, Local 206, has applied under section 55 of The Labour Relations Act requesting the Board to make a declaration that a sale of a business within the meaning of the Act has taken place between the respondent, Gordons Markets, a Division of Zehrmart Limited, as the purchaser and Loblaws Limited as the vendor, and that Gordons is therefore bound by the collective agreement that was in effect between the applicant and Loblaws for a term effective January 1, 1976 to May 31, 1978. In addition, the union has complained under section 79 of the Act that Gordons Markets has dealt with the named grievors, all former Loblaws employees, in violation of section 58(a) of The Labour Relations Act.
4. Although somewhat complicated, the facts of this case are not in dispute. Cambridge Leaseholds Limited is the owner of the property in question in Windsor. In 1962 Cambridge leased the premises to Supercity Limited which operated as a discount food store. Ten years later, in 1972, Supercity assigned its lease to Loblaws which operated the premises as a retail grocery store until the 1977 transaction in question in this case. At one time Loblaws had six or seven stores in the Windsor area. The testimony reveals that in 1977 Loblaws decided to close its last store in the area because business was not good.
5. The term of the lease in effect between Cambridge and Loblaws was from 1962 through 1987 with three five-year options for renewal which would carry the lease arrangement through the year 2002. In furtherance of its intention to close its operation, Loblaws requested Cambridge to accept a surrender of the lease. To this end an agreement was drawn up between Loblaws and Cambridge Leaseholds dated June 28, 1977, effective September 30, 1977 whereby Cambridge agreed to accept the surrender of the lease and release

Loblaws from all its obligations. Cambridge's willingness to accept the surrender of the lease from Loblaws was not an insular decision but was made dependent on Cambridge's ability to enter into another lease arrangement for the running of the retail food store. This latter arrangement was made with Zehrmart Limited which decided to run the food store through its Gordons Markets division. The two sets of negotiations were overlapping in time and were interdependent. Just as with the surrender agreement, a condition of the lease arrangement with Zehrmart was that it would not become effective unless and until Cambridge received an executed surrender of lease from Loblaws.

6. A lease between Zehrmart and Cambridge was drawn up the day after the surrender on June 29, 1977 but was not signed. The final and binding lease arrangement between Zehrmart and Cambridge was dated September 30, 1977, signed December 21, 1977 and made effective October 1, 1977, the day after the effective date of the surrender of lease agreement between Cambridge and Loblaws.

7. Loblaws closed its store with an advertised going out of business sale on August 13, 1977. On August 15th all unsold inventory was cleared out of the Windsor store and sent to another Loblaws in London. When Gordons took over, the store was completely gutted. It appears from the evidence that the gutting of the store was consistent with Gordons' plans, as Gordons' made extensive alterations to the store by adding a 7,000 sq. ft. addition and completely renovating the interior.

8. With respect to the corporate relationship between Zehrmart and Loblaws, we note that both are included in the Weston group, which consists of Loblaws, National Grocers, Zehrmart and Gordons Markets. Loblaws, owns the common shares of Zehrmart and National Grocers owns the preferred shares. Zehrmart itself has two divisions, Zehr's Market and Gordons Markets, the branch of Zehrmart running the store in question in this case.

9. Mr. Richard Goldsmith, the assistant general manager of Gordons, testified that although he had hired some of the former Loblaws employees at one of his two other Gordons stores in Windsor, none were hired for the store in question. He indicated that the former Loblaws employees were not excluded by virtue of their qualifications but were denied employment because he wanted to eliminate a link that might be made between the two stores in an anticipated successor rights application. He stated that he was aware of successor rights attaching to a union and thought that because his store was without a union it would be best not to get involved with one. Gordons did its hiring through Manpower and the evidence establishes that interviews were set up which included former Loblaws employees. Ms. Lynn Stafford testified on behalf of all the grievors and stated that two hours before she was to be interviewed by Gordons, she was informed by Manpower that Gordons did not want to see her.

10. We turn first to the applicant's complaint that the respondent refused to employ the grievors in violation of section 58(a) of the Act which reads as follows:

No employer, employers' organization or person acting on behalf of an employer or an employer's organization,

- (a) shall refuse to employ or continue to employ a person, or discriminate against a person in regard to employment or any term or condition of

employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

Having regard to Mr. Goldsmith's evidence that the reason he refused to employ these individuals was because he wanted to avoid a successful successor rights application under section 55, the Board is satisfied that he refused to hire them in violation of section 58. If the employees of Loblaws had not organized themselves, Gordons would have had no objections to hiring them. It was because they had exercised their rights under the Act that Gordons refused them employment in the store in question.

Accordingly, the Board orders that each of the grievors be fully compensated for all lost wages and benefits from the day the store opened in February, 1978 until the date payment is issued. The Board remains seized of this aspect of its order in the event that the parties are unable to agree on the appropriate compensation.

11. Turning to the section 55 application, the relevant parts of the section read as follows:

55.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

12. Section 55(1) defines "sells" as including leases, transfers and any other manner of disposition. Counsel for the respondent argues that the lease arrangement in this case is not a sale within the meaning of section 55 of the Act because there was no disposition between Loblaws on the one hand and Zehrmart on the other. Rather than a single disposition, counsel characterizes the transaction as two separate dealings made with a third party, the first a surrender of lease agreement from Loblaws to Cambridge and the second, a granting of lease from Cambridge to Zehrmart. Since there was no direct transaction between Loblaws and Zehrmart, such as an assignment of a lease, counsel argues that there can be no finding of a section 55 sale. Counsel further argues that even if the tripartite nature of the transaction does not inhibit the finding of a sale, the Board should decline to make such a finding because there was no transfer of goodwill, there was a hiatus between the closing of Loblaws and the opening of Gordons and because no former Loblaws employees were hired at Gordons.

13. Counsel for the applicant takes the position that the tripartite nature of this transaction should not defeat the section 55 application. He argues that if this form of three-corner agreement could be used to side step the application of section 55 it would serve as a blueprint to defeat the purpose of the successor rights provisions of The Labour Relations Act. Counsel argues that the evidence in this case clearly establishes that the three parties were working hand-in-hand and that instead of constituting two separate and severable transactions as suggested by counsel for the respondent, it forms one basic transaction, each part of which is dependent on the other.

14. Consistent with the two-fold purpose of section 55 which is to both prevent the undermining of bargaining rights and provide a permanence for established bargaining rights and consistent with the broad interpretation the Board has given to the definition of "sell" in recognition of the aims of the section (see *Thorco Manufacturing Co*, 65 CLLC 787), the Board has repeatedly held that the lack of direct contact or transfer between the predecessor and successor employers will not automatically defeat a section 55 application. The Board, for example, has found the existence of a section 55 sale in numerous receivership cases where the predecessor employer has gone into receivership and the receiver rather than the original employer has transferred the business to a successor employer (see *Marvel Jewellery Limited* [1975] OLRB Rep. Sept. 733 among others). In *Winiker Industrial Auctioneers Ltd.*, [1978] OLRB Rep. Jan. 15, the Board stated that "it makes no difference whether the business has been transferred directly from the employer named in the collective agreement (or for which the union holds bargaining rights) or whether it has been transferred through a receiver, or some other intermediary". (See also *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, where the transaction took the form of a double sale so that the employer named in the collective agreement was not the vendor in the immediate transaction in issue before the Board.)

15. *Thunder Bay Ambulance Services Inc.*, File No. 1769-77-R, decision dated May 2, 1978, involves a three-cornered transaction similar in form to the transaction in issue in this case. In that case the Ministry of Health was the third party intermediary between the predecessor and successor employers. The predecessor employers, two hospitals, managed and operated a group of assets owned by the Ministry of Health for the purpose of providing ambulance service in the Municipality of Thunder Bay. The Ministry issued the licence the hospitals required to run the ambulances and ancillary equipment. Because the two hospitals did not want to amalgamate their respective services in accordance with the Ministry's recommendation, they decided to give up their licence and discontinue their ambulance service. They did not transfer their licence to the successor employer who took over the ambulance service, but gave it back to the Ministry and the Ministry then issued a new licence to the successor employer. The predecessor transferred nothing directly to the successor. They were prohibited by law from transferring their licence and had no assets, inventory, accounts receivable or customer lists to transfer. Notwithstanding the lack of direct contact between the two employers, the Board found that the business itself had been transferred from the predecessor to the successor through and by the Ministry. The Board stated at page 7,

Although the same licence or piece of paper was not transferred between the two, the Board has no hesitation in finding that exclusive entitlement, [to run an ambulance service] as embodied in a Ministry of Health Licence, was transferred ...

Having regard to the transfer of the exclusive right to use the Ministry's assets, to the transfer of managerial skills and to the uninterrupted continuation of the identical job functions, the Board must conclude that the Ministry of Health, the entity charged with maintaining an ambulance service in the Municipality of Thunder Bay, did not facilitate the establishment of a similar or parallel business but rather it served as the necessary link in the transfer of the predecessors' businesses to the successor.

16. Having regard to the purpose of section 55 and the Board's jurisprudence as set out above, the Board is satisfied that the existence of Cambridge Leaseholds as a third party intermediary and the lack of evidence of direct contact between Loblaws and Zehrmart does not by itself preclude the finding of a section 55 sale although it may complicate the situation.

17. No matter what the form of the transaction, in order to find that a section 55 sale has taken place, the Board must be satisfied that the result of the transaction is a continuation of the predecessor's business. Since it is the predecessor's business to which the union bargaining rights attach, the successor's business must draw its life from the predecessor's business. The subsequent existence of a business identical to that carried on by the predecessor will not result in a section 55 finding of a sale if the Board is satisfied that the second business is merely a parallel business of a similar nature rather than a continuation of the successor's business.

18. The question to be answered by the Board therefore is whether or not the business carried on by Gordons as a retail food market is a continuation of Loblaws' retail food business or whether it is a separate and parallel business, albeit of the same nature.

19. In *Zehrs Markets Limited*, [1974] OLRB Rep. May 331, the Board declined to find that a section 55 sale had taken place because it was satisfied that because the predecessors' business had fully ceased its operations by the time the transaction took place, the successor employer had established a fully separate, parallel business rather than a continuation of the predecessor's business. Busy B had been closed down for six or seven months by the time it transferred its lease to Zehrs Markets and had, during that time, advertised the premises for rent indicating to all customers that Busy B had gone out of business and that any third party could rent the premises to operate another type of business. In reaching its conclusion, the Board noted that any goodwill that would ordinarily arise from the location of a grocery store would have disappeared with the lengthy open-ended advertising of the premises for rent.

20. In *Sunnybrook Food Markets*, [1966] OLRB Rep. Oct. 531, the Board was also satisfied that no sale of a business had taken place notwithstanding the fact that the predecessor and successor employers carried on identical businesses. Because the predecessor employer opened a new branch in the same market area, advertised its move and requested customers to follow them to their new location, the Board concluded that the predecessor employer had taken the essence of its business with it leaving nothing behind for the successor except unwanted assets.

21. In *Dutch Boy Food Markets* 65 CLLC ¶16051, on the other hand, the Board found

that a sale of a business had taken place between Steinberg's and Dutch Boy Markets. In that case, as in the case before the Board, no former employees were hired and Dutch Boy did not open for business immediately after the transaction because they made extensive renovations. In its reasons for decision, the Board commented at p. 777 on certain aspects of the retail food industry which arise for consideration in the instant case: the nature of goodwill, the effect of a time lapse between the closing of one business and the opening of another as well as the effect of the successor employer not purchasing foodstuff and inventory:

a retail food supermarket, unlike some other businesses, has no customer orders or lists which can be transferred to a purchaser who intends to carry on the same type of business. By the very nature of a retail food business, with the exception of the name, a vendor has no goodwill which he can effectively give or withhold from a purchaser. The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. *Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located on the same premises.* If there was any goodwill to be acquired by Kitchener Food it was inherent in the premises themselves in which Steinberg's had carried on the same type of business as that carried on by Kitchener Food. *Accordingly, the exemption of goodwill from the purchase price, in our opinion, has no real meaning.*

Each food supermarket chain endeavours to attract customers on the particular quality of its merchandise. In this connection it features and advertises its own name brand products. *Accordingly, it is to be expected that one chain food store would not be interested in acquiring the foodstuffs and inventory of another chain food store.* This perhaps is particularly true in the instant case, since the evidence is that Steinberg's ceased its operation on the premises in question because it had not proved to be a sufficiently profitable operation to maintain. *In our view, the failure of Kitchener Food to purchase the foodstuffs and inventory does not have any significant effect in our determination* as to whether there was a sale of a "business".

With reference to the argument relating to the lapse of time before Kitchener Food opened its store, we are of the opinion that an analogy cannot be drawn between a retail food business and a manufacturing operation. In the latter case, if there was a shut down of the operation at the time of a sale to a purchaser who intends to carry on the same type of business, the result generally would be a production and financial loss to both the vendor and the purchaser. In the former case, however, *it is generally necessary to shut down operations at the time of a sale in order to give the new owner an opportunity to make renovations which are in accord with its particular method of merchandising and carrying on business.* It also allows time for the new owner to stock the premises with its own foodstuffs and inventory.

(emphasis added)

(For a similar finding on similar facts see also the Board's decision in *Leader's Clover Farms Food Market* [1966] OLRB Rep. Nov. 636). Because of the unique nature of the retail food industry, the Board in *Dutch Boy Food Markets* was of the opinion that the absence of goodwill as a specified item in the transaction, the failure to purchase foodstuffs and inventory, in addition to the lapse of time between the closing of one store and the opening of the new one in order to make renovations, all of which conditions exist in the case at hand, had no detrimental impact on finding that a section 55 sale had in fact taken place.

22. In the instant case, having regard to the evidence and the Board's jurisprudence, and despite the lack of evidence of direct contact between Loblaws on the one hand and Zehrmart or Gordons on the other, the Board is satisfied that the tripartite transaction did not merely mark the establishment of a similar or parallel business, but that the lease arrangement with Zehrmart marked the transfer of Loblaws' business to Zehrmart with Cambridge acting as the necessary conduit. For the following reasons we are satisfied that Zehrmart's new business, run through its Gordons Markets division, drew its life blood from Loblaws and constitutes a continuation of Loblaws' business.

23. As emphasized in the *Dutch Boy* decision, *supra*, much of the goodwill in the retail food industry attaches to the location of a store and the habit of customers patronizing the food market located on the particular premises. Unlike the *Sunnybrook Food Markets* case, *supra*, Loblaws moved out of the Windsor area completely and could take none of its customers with it. As well, although there was a six month hiatus between the closing of Loblaws and the opening of Gordons, the premises were never advertised for rent and it was clear that the renovations being made were for a new supermarket and not for some other retail use. Unlike the *Zehrs Market* case, *supra*, therefore, the goodwill which attached to the Loblaws premises, was not lost between the closing and opening and was, in the Board's view, transferred from Loblaws to Gordons through Cambridge Leaseholds.

24. The Board attaches no weight whatsoever to the fact that Gordons did not hire Loblaws employees. If the mere failure of the successor employer to hire the same employees could defeat a section 55 application, the purpose of the successor rights provisions could be completely undermined. While in some cases, the existence of the same employees is a helpful indicator in determining whether or not there has been a continuation of a business, the Board, in the circumstances of this case, where the successor employer admitted not hiring employees specifically to negate a possible link between Loblaws and itself attaches absolutely no significance to the fact that there were no employees of Loblaws hired by Gordons. We note as well that in the *Dutch Boy* case, *supra*, and *Leader's Clover Farms*, *supra*, where the Board found that there was a sale of a business, the successor employer had not hired any former employees.

25. Part of Loblaws' business may be defined by the nature of the lease arrangement it had with Cambridge. The Board agrees with the submissions of counsel for the union that in most of its significant elements, Cambridge plugged Gordons into the old lease arrangement. Although there were some alterations in the lease, the situation looks more like one where Zehrmart simply took over Loblaws' old lease rather than entered an entirely independent lease arrangement of its own. We note for example that the lease runs for a time equivalent to the remaining term of the original lease with Loblaws; it establishes the same rent and in each case the premises could be used only as a supermarket. The continuity of the two transactions is further marked by their precise timing; the surrender took effect on

September 30th, the new lease took effect on October 1st and each aspect of the arrangement was conditional on, rather than independent of, the other.

26. For the reasons given above, therefore, the Board finds that a sale within the meaning of section 55 of the Act has occurred and that the bargaining rights of the union, which are attached to the predecessor's business, are preserved. Accordingly, the Board declares that the respondent is bound by the collective agreement that was in effect between the parties from January 1, 1976 to May 31, 1978 and subject to the rights and duties that flow therefrom.

2020-77-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant), v. Kenneth R. Green, carrying on business as **Greens Ambulance**, (Respondent).

S-79 – Practice and Procedure – Board finding it lacks jurisdiction to enforce a settlement where such settlement was not intended to resolve a pending section 79 complaint

BEFORE: G. Gail Brent, Vice-Chairman and Board Members M.J. Fenwick and W. H. Wightman.

APPEARANCES: *Ted Wohl and A. Campbell for the complainant; Thomas A. Cline, Q.C. and Wayne Green for the respondent.*

DECISION OF THE BOARD; July 10, 1978

1. The original complaint filed before the Board alleged that the respondent (a) refused to continue to employ the grievor because she was a member and supporter of the complainant trade union contrary to section 58(a) of the Act and (b) failed to comply with the terms of a settlement signed by him and the complainant dated January 29, 1977 by terminating the employment of the grievor without just cause, contrary to sections 58(a), 58(c), 70(2) and 79(6) of the Act. At the hearing, counsel for the complainant stated that the complainant was withdrawing the allegation that the grievor was discharged for union activity.

2. At the hearing a copy of an agreement (Exhibit #1) dated January 19, 1977 was introduced into evidence. There is no disagreement between the parties that they entered into this agreement on January 19, 1977 in the presence of an examiner who had met with the parties in an attempt to deal with some problems arising out of two certification applications made by the complainant. The agreement contained, inter alia, a list of members of the bargaining unit (the grievor's name appears there) and the following clause:

“None of the aforementioned persons will be fired or terminated except for just cause.”

There is no mention on the face of the agreement that this or any other concession was intended to be by way of settlement of any outstanding dispute or in consideration of the complainant not filing a complaint before this Board.

3. The Board heard testimony from Mr. A.G. Campbell who signed the agreement on behalf of the complainant. The essence of this testimony was that on January 19th the complainant learned that an employee named Boris Pagnacco was going to be discharged because of changes in the *Ambulance Act*. Mr. Campbell said that he objected to the proposed discharge and, although he could not remember saying that charges would be filed, he was "sure he would have pointed out that charges would have to be considered." In any event the clause concerning discharge for just cause was inserted in the agreement and Mr. Pagnacco was never discharged.

4. At the hearing a preliminary objection was raised by the respondent concerning the jurisdiction of the Board to hear this matter. The essence of this objection was that the agreement was not a settlement within section 79(6) of *The Labour Relations Act*, and that even if this were a section 79(6) settlement, then section 79(6) only refers back to section 79(1) which limits the Board to the appointment of a Labour Relations Officer.

5. The second part of the objection was dealt with at the hearing. If a settlement, within the meaning of section 79(6), has been breached such a complaint is surely made tantamount to a "complaint alleging a contravention of this Act," within the meaning of section 79(1), and there is no merit to the suggestion that the full enforcement provisions of section 79 would not be available to the Board.

6. The other problem before the Board is whether this is a settlement within section 79(6) which reads as follows:

"Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be deemed to be a complaint under subsection 1."

The fact that the agreement was worked out with the assistance of an examiner who was there because of a meeting to deal with bargaining unit problems arising out of a certification application does not, per se, prevent this agreement from being a settlement.

7. The real difficulty is whether "the matter complained of has been settled", and specifically whether a section 79(6) settlement contemplates that there must first be a complaint filed with the Board before there can be such a settlement. The Board appreciates the submission made on behalf of the applicant that requiring the filing of a complaint prior to entering into a settlement might lead to injustice in some cases. There are, however, two problems in relation to section 79(6) in this case, either of which would lead to the conclusion that the Board has no jurisdiction under section 79(6).

8. In the first place, the Board has jurisdiction to enforce a settlement only through section 79(6). That subsection speaks of "a matter complained of." In the case at hand it is difficult to see what the "matter complained of" was. Mr Pagnacco was never discharged and there never was a complaint of any contravention of the Act filed with the Board. It would appear that section 79(6) requires that a complaint first be filed with the Board before there can be a "matter complained of."

9. Even if we are wrong in that conclusion, the evidence of what occurred here does not lead to the conclusion that the agreement is a settlement of the Pagnacco affair. Mr. Campbell could not recall saying he was going to file a complaint under the Act and the agreement on its face does not mention that any of its terms were negotiated in settlement of an anticipated claim concerning Mr. Pagnacco. While there is no express promise on the part of the applicant to forebear from laying a complaint, an implicit promise would probably suffice if it were possible to infer one from the circumstances. In this case the circumstances give rise to no such inference because there is no evidence that the possibility of any action was ever discussed or that Mr. Pagnacco's termination, which was not to have taken effect until later, would have been taken care of by an agreement which would have been supplanted by the collective agreement by then. It appears rather that Mr. Campbell, upon hearing of the anticipated action concerning Mr. Pagnacco, wanted to negotiate some clause which would ensure a measure of job security to the employees pending the negotiation of a collective agreement. Therefore the consideration for the "just cause" clause was not any forbearance from filing a complaint concerning Mr. Pagnacco, which would perhaps have made the agreement a settlement, but rather the threatened future action against Mr. Pagnacco was the warning that some protection ought to be negotiated pending a collective agreement.

10. The argument at the hearing all centered around the applicability of section 79(6) to the matter before us, even though the complaint itself referred to a breach of section 70(2) as well. Following the hearing, the Board contacted the parties to request submissions with respect to the possible effect of section 70 on the problem before us. It was at that time the wish of the Board to see if the parties wished to argue that the Board might assert jurisdiction under section 70 because the agreement represented terms and conditions of employment which could not be unilaterally altered by the respondent. No such argument was made to the Board, therefore we are placed in an awkward position. For the purposes of determining jurisdiction, should we consider a section of the Act which has been referred to in the complaint but not argued before us even in response to our direct request, or should we assume that the parties have determined that our jurisdiction should be determined only on the basis of that part of the Act which they have chosen to argue before us? While the latter position may seem strict in cases where the parties are not represented by counsel, it is the position that the Board should take in this case. Counsel are best aware of the facts as they apply to the determination of a jurisdictional issue and we must be guided by the argument which they choose to make. Therefore, since counsel in their judgment, chose under the circumstances to ignore section 70 then the Board must be guided by that judgment.

11. Before concluding this decision, and by way of obiter, the Board would clearly have had to consider the question of just cause if it had had jurisdiction. In so doing the Board would not have been acting as a Board of Arbitration and would not have been affected by section 37 of the Act, but rather the Board would have been dealing solely with the question of whether any provision of the Act had been contravened by discharging the employee.

12. For all of the reasons set-out above, the Board determines that it does not have jurisdiction to act in this matter because there was no settlement within the meaning of section 79(6).

0145-78-U Wakefield Harper, (Complainant), v. The Civic Institute of Professional Personnel, (Respondent).

S-79 – Duty of Fair Representation – Board found that a trade union which considered an employee grievance, and, on the advice of counsel declined to support it, did not breach its duty.

BEFORE: Kevin M. Burkett, Vice-Chairman.

APPEARANCES: *R. Montague and W. Harper for the complainant; C. MacLean and D. Kardish for the respondent; D. Cameron and R. Anderson for the Regional Municipality of Ottawa-Carleton.*

DECISION OF THE BOARD: July 6, 1978

1. This is a complaint filed under Section 79 of the Act alleging a violation of section 60 of the Act. The complaint alleges that "the Civic Institute of Professional Personnel (the respondent) acted in a manner that was arbitrary and in bad faith in withdrawing their support of Mr. Harper's arbitration."
2. Mr. Harper commenced employment with Island Lodge, a home for the aged owned and operated by the Regional Municipality of Ottawa-Carleton, on October 28, 1974. He was initially hired as the supervisor of male nursing attendants but was subsequently relieved of his supervisory responsibilities. He was a graduate nurse at the time of his employment in 1974 but had not completed the requirements necessary for registration. Mr. Harper was absent on sick leave from July 29 to August 15, 1977. The day following his return to work he was terminated from his employment by letter from the Director. The letter sets out three grounds upon which the employer bases its decision to terminate his services; firstly, recurring lateness, secondly, his failure to advise as to when he would be returning to work from sick leave and thirdly, his refusal to carry out assigned duties during the course of his shift on August 15. The union filed a grievance on behalf of Mr. Harper and following the failure of the parties to resolve the matter it was processed to arbitration. An arbitration board chairman was selected and a hearing date of November 21, 1977 was set. The union retained the services of a lawyer to represent it at the arbitration hearing. Mr. Kardish, the union's grievance committee chairman from November 9, 1977, testified that the union felt it could meet the three grounds set out in the letter of termination. The hearing scheduled for November 21 had to be postponed because counsel for the employer was ill and because Mr. Harper had been charged with possession of stolen property and was incarcerated at the time.
3. Mr. Kardish was advised shortly before November 21st that the employer intended to rely on additional grounds to those set out in the letter of termination. He was told that subsequent to the termination of Mr. Harper the employer had discovered that he had written his registration exams during the period he was on sick leave and would now be relying on abuse of sick leave in addition to the reasons set-out in the letter of termination. Mr. Kardish advised union counsel of this development and asked for a legal opinion as to whether the employer could rely on additional grounds. By letter dated November 30, 1977 counsel for the union advised that "the employer would be permitted to rely at the hearing on allegations concerning Mr. Harper's conduct that did not come to its attention until after the disciplinary action was taken." The union counsel, by letter of the same date to counsel

for the employer, asked if the only grounds the employer would be relying on were those set out in Mr. Harper's letter of termination. Counsel for the employer replied by letter of December 19, 1977 which states in part:

"The Regional Municipality will be relying upon the grounds that are set out in your letter. In addition, the Regional Municipality will rely on the fact that Mr. Harper was absent during August 1977 to take refresher courses and RN examinations while officially off work due to illness. Not only is this contrary to normal employer employee relations, but it would appear that the medical certificate filed must have been obtained improperly and it is not consistent with prior arrangements made for enabling Mr. Harper to take the RN courses and examination."

4. The prior arrangements for enabling Mr. Harper to take the RN courses and examinations as referred to in the employer's letter of December 19, 1977 were the result of a settlement of a previous grievance which had been filed by the union on Mr. Harper's behalf. Mr. Harper had been terminated from his employment in late March of 1977, some four and one half months before the termination giving rise to this matter, for an alleged misuse of educational leave. The union settled the grievance arising out of the previous termination on the basis that Mr. Harper would be returned to work with a 12 day suspension and whenever possible the Director of the Homes for the Aged would allow Mr. Harper time off without pay to enable him to fulfil his course requirements.

5. In response to the position taken by the employer in its letter of December 19, 1977 and the legal advice received from union counsel in the letter of November 30, 1977, Mr. Kardish asked union counsel for an opinion as to the union's chances for success at arbitration. Counsel replied by letter dated January 13, 1978 and gave the following opinion:

"I have now completed my legal research and have had discussions with Mr. Harper and his family doctor and am, therefore, in a position to give you our opinion on this ground for dismissal.

There are two aspects to Mr. Harper's leave which the Employer could be justified in disciplining. The first is his absence during August, 1977 to write his examinations in Hamilton. The law is clear that it is a serious matter for an employee to be on sick leave when he is not sick.

After discussing Mr. Harper's health in August with his doctor, I am satisfied that we could put forward a good case that Mr. Harper was in fact suffering from severe anxiety in August and was following his doctor's recommendation in absenting himself from work. The cases show that a grievor can be judged too ill to go to work and yet well enough to be up and about doing other things. I cannot be sure, however, that the employer would find Mr. Harper was too sick to work if he was well enough to write his exam.

The second aspect of the case involves Mr. Harper's absence from work in order to meet the course attendance requirements from March, 1977, to August. Mr. Harper has advised me that he had to attend eight courses which were held on Thursdays. He told me that some of these courses took place

before his return to work in April, 1977, but that he had attended some of them after his return to work. When I asked him whether he had done so on his days of rest he replied that in certain cases he had taken days of rest and in other cases he had used sick leave.

I do not believe that the Employer is aware of the manner in which Mr. Harper fulfilled his course requirements but this evidence would certainly come to light at any arbitration.

It is our opinion that this misuse of individual days of sick leave is a violation of the terms of Mr. Harper's re-hiring by the lodge and that it would also weaken any argument which we would have been able to make concerning his August absence on sick leave.

We would, therefore, recommend that the institute discontinue its support of Mr. Harper's case. If you have any further questions, please contact me."

6. The matter of Mr. Harper's arbitration was raised at a union Board of Directors meeting held on January 26, 1978. The evidence establishes that decisions relating to the processing of grievances to arbitration are made by the 12 man Board of Directors on advice of the Grievance Committee. The union had previously processed only 1 grievance to arbitration. The evidence establishes that the legal opinion set-out in the letter of January 13, 1978 was read to the Board of Directors by Mr. Kardish and a vote was taken as to whether the union should continue to back Mr. Harper. The Board of Directors, with all 12 members present, voted to "drop" the Wakefield Harper case. The minutes of that meeting as filed in evidence are set-out below:

- "(a) Discussion began on the Wakefield Harper and Janet Chene declared interest and did not take part.
- (b) D. Kardish reported a letter had been received from Catherine McLean advising us as to whether we should proceed with this grievance. Much discussion took place and David said we have enough legal opinion to drop the case. He suggested as an alternative, we could invite Wakefield to a Board meeting and advise him that we would continue but that he would be responsible for paying the legal fees. It was decided not to invite Mr. Harper to a meeting of the Board.
- (c) D. Kardish moved that we drop the Wakefield Harper case, write a letter to Wakefield advising him that we will no longer be pursuing his case, and write a letter to the employer advising we will no longer be pursuing the case. Seconded by G. Bellomo.

CARRIED"

7. Mr. Kardish admitted in cross-examination that the union, having secured Mr. Harper's reinstatement a few months earlier after he was discharged for a related offence, felt "let down" or "stabbed in the back". He further admitted that he personally did not ask

Mr. Harper for an explanation as to how he could write an exam while on sick leave but testified that he took it as a fact that if Mr. Harper passed the exam he had written it. He did testify, however, that he informed Mr. Harper that his grievance was on hold because of new information the union had received about his writing the RN examination. Mr. Harper denied that Mr. Kardish had told him why his grievance was on hold and further denied that counsel for the union had informed him of the nature of the additional allegation against him. He admitted that counsel for the union advised him that additional grounds had been raised but testified that he asked to see these in writing and was not advised as to what additional grounds had been raised.

8. The evidence of Mr. R. Milling, the immediate past president of the union, and Mr. Kardish establishes that the discussions preceding the vote taken by the Board of Directors on January 26, 1978 covered the cost of pursuing Mr. Harper's grievance to arbitration and the effect of so doing on the relationship between the employer and the union.

9. Mr. Harper was advised by letter dated January 27th that the union was withdrawing his grievance.

10. Counsel for the complainant argues that the trade union acted arbitrarily in deciding not to pursue Mr. Harper's grievance to arbitration for two reasons. Firstly, it acted on information received from the employer and formed the mistaken assumption that if the grievor wrote the exam he could not have been ill and should not have been on sick leave. In the face of having failed to confront the grievor or ask him for an explanation, counsel for the complainant argues that the subsequent decision to drop the case must be found to be arbitrary. Secondly, counsel argues that the Board of Directors were blinded because they felt they had been stabbed in the back by Mr. Harper and therefore did not contact him, fully investigate his case or give him the benefit of the doubt. Counsel claimed that the union would have conducted a more extensive investigation if it had been dealing with someone other than Mr. Harper and its failure to fully investigate his case must lead to a finding of arbitrariness and possibly bad faith.

11. Section 60 of the Act provides:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

12. It is well established that the duty imposed by Section 60 of the Act does not require a trade union to process every grievance to arbitration. In this regard the Board stated in the *Rutherford's Dairy* case [1972] OLRB Rep. March 240:

"... A union has an obligation not only to each individual member but to the bargaining unit as a whole and if it processes grievances to arbitration that appear to have virtually no chance of success it would do so to the detriment of the other bargaining unit employees not only because of the expense involved but because of the reputation the union would gain."

What then is the nature of the duty which falls to the union under Section 60 of the Act? An analysis of the terms used to describe the conduct proscribed by Section 60 of the Act can be found commencing at paragraph 24 of the *Walter Princedomu* case, [1975] OLRB Rep. May 444. The analysis contained therein is helpful in defining the nature of the duty. The Board stated in that case:

- “24. Bad faith and discrimination are not being alleged in the facts at hand but their meaning is well worth a brief examination. The sequential use of the words may assist in elaborating the total meaning of the duty and at the very least the particular application of each word demonstrates why this case is difficult. The prohibition against bad faith and discrimination describe conduct in a subjective sense – that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union. (See Adell, *The Duty of Fair Representation – Effective Protection for Individual Rights in Collective Agreements?* (1974) 25 Indus. Rel. 602, 611.) Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc. preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent. But as important as this subjective ill-will aspect of the duty is and as difficult as it may be to apply in some circumstances the most vexing and difficult application of the duty today is in giving meaning to the word ‘arbitrary.’
25. In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent’s particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word ‘perfunctory’ and observed that a trade union, ‘in a non arbitrary manner [must] make decisions as to the merits of particular grievances.’ It could be said that this description of the duty requires the exclusive bargaining agent to put ‘its mind’ to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.
26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.

(See, for example, *The Steel Company of Canada Limited* [1974] OLRB M.R. 392; *Rutherford's Dairy Limited* [1972] OLRB M.R. 240; *Steinberg's Limited (Miracle Food Mart)* [1972] OLRB M.R. 423. See also Flynn and Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee* (1974) 8 Suffolk University, Rev. 1096, 1143; Clark, *The Duty of Fair Representation: A Theoretical Structure* (1973) 51 Tex. L. Rev. 1199, 1173). The rationale of this consensus was canvassed by the Board in *Ford Motor Company of Canada Limited* [1973] OLRB M.R. 519 at para. 40:

“40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al*, 8 D.L.R. (3d) at 521 at p. 546.”

The Board in the *Princedomu* case (supra) went on to say in respect of the term arbitrary,

“... It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision making was intended. Accordingly at least flagrant errors in processing grievances – errors consistent with a ‘not caring’ attitude – must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection ...”

In summary, the duty imposed by Section 60 of the Act in respect of individual grievances is one which requires the trade union to treat the individual's complaint in the same manner as the complaints of other employees, to leave open the avenues of discussion which are available to other employees and, whether right or wrong, to “put its mind” to the merits of the grievance.

13. The union in this case made the decision to process Mr. Harper's grievance to arbitration and indeed, a hearing was scheduled. The hearing did not take place partly because of the unavailability of Mr. Harper. The union was prepared to fully support Mr. Harper in respect of the grounds for discharge contained in his termination letter of August 16, 1977 just as it had fully supported his grievance challenging his termination from employment some 4 ½ months before.

14. Mr. Kardish did not become aware of the additional grounds upon which the employer intended to rely until shortly before November 21. His response was to secure two legal opinions; the first stating that the employer could rely on grounds not known to it at the time it terminated the grievor's employment and the second recommending that the matter not be proceeded with to arbitration. His conduct in this regard cannot be labelled as arbitrary or in bad faith.

15. The complainant argues that Mr. Harper was not advised or confronted with the additional grounds for discharge and was not given an opportunity to explain the circumstances. The evidence on this point is conflicting. Mr. Kardish testified that he advised the grievor that his case was on hold because of new information the union had received about his writing of the RN exam. Mr. Harper would have us believe that although advised that his discharge grievance was on hold he did not ask why. He would have us further believe that although informed by union counsel that new grounds had been raised he did not inquire as to what these new grounds were. The Board prefers the evidence of Mr. Kardish and finds, therefore, that Mr. Harper was informed that his case was on hold because of information concerning his writing of the RN exams. Mr. Harper admitted that he wrote his R.N. exam on either August 10th or 11th during the period he was absent from work on paid sick leave. Having regard to this evidence the Board is satisfied that Mr. Harper knew the reason why his grievance was on hold and in the face of this knowledge he remained silent. The evidence does not support the finding that he was ever denied the opportunity to explain himself.

16. The decision by the full Board of Directors on January 26th to withdraw the grievance of Mr. Harper from arbitration was taken after the legal opinion recommending that course of action had been read to it. The preamble to the legal opinion states:

"I have now completed my legal research and have had discussions with Mr. Harper and his family doctor and am, therefore, in a position to give you our opinion on this ground for dismissal."

The legal opinion, taking into account the terms of settlement of the previous termination and the conduct of the grievor upon which the employer intended to rely, recommends that the matter not be proceeded with. The evidence establishes that the cost of proceeding and the effect on the on-going relationship between the union and employer were also discussed. Although the Board of Directors felt betrayed or "stabbed in the back" at the time it took the decision to withdraw its support of Mr. Harper's grievance, this fact, when considered in light of the other facts relating to the decision-making process, does not cause the Board to find that Mr. Harper was treated in an arbitrary manner or in bad faith. The Board notes that Mr. Harper does not claim that he was legally entitled to be present at the Board of Directors meeting on January 26, 1978.

17. The complainant admits that the union has properly represented him in the past. The union was prepared to take Mr. Harper's case to arbitration until it became aware that the employer was intending to rely on grounds not previously known to it. The union's response was to put the grievance "on hold" and to seek two legal opinions. These opinions, which recommended withdrawal, were received and considered by the Board of Directors. In addition, the Board of Directors considered the cost of arbitration and the effect on its relationship with the employer. These are valid considerations. Notwithstanding whatever explanation Mr. Harper may have for his decision to write RN exams during the period he was on paid sick leave, he remained silent in the face of knowledge that his grievance was "on hold" because of new information about his writing the RN exam. Although it could be argued that either Mr. Kardish or the Board of Directors should have confronted Mr. Harper and asked for an accounting, their failure to have done so in the circumstances of this case does not constitute a breach of the duty set out in section 60 of the Act. The legal opinion explicitly states that counsel has discussed the matter with Mr. Harper and his family doctor. The Board is satisfied that the decision taken by the union in respect of the grievance of Mr. Harper was based upon the legal opinion and other proper considerations and was not arbitrary, discriminatory or in bad faith.

18. Having regard to all of the foregoing this complaint is hereby dismissed.

0707-78-U United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency, (Complainant), v. United Brotherhood of Carpenters & Joiners of America, The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America, Local 38 of the United Brotherhood of Carpenters & Joiners of America, Art Varty and **Jen-Mar Construction Limited**, (Respondents).

S79 – Construction Industry – Employer entering into local arrangement with union during province wide strike – Arrangement held illegal and void

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D.B. Archer and E. C. Went.

APPEARANCES: *G. Grossman and B. W. Binning for the complainant; Jens Holm for the respondent, Jen-Mar Construction Limited; Stanley Simpson, T. G. Harkness and Arthur Varty for the other respondents.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER E. C. WENT. July 26, 1978

1. The name of the respondent "Jen-Mar Construction" appearing as the name of one of the respondents in the style of cause of this complaint is amended to read: "Jen-Mar Construction Limited".

2. The complainant has filed this complaint under section 79 of The Labour Relations Act and complains that the respondents have acted contrary to the provisions of section 133(2) of The Labour Relations Act.

3. The complainant has requested the Board to declare that the respondents have violated section 133(2) of The Labour Relations Act. The complainant has also requested the Board to order the respondents to cease and desist from engaging in actions in violation of section 133(2) of The Labour Relations Act.

4. On March 3, 1978, the Minister of Labour pursuant to section 127(1)(b) of The Labour Relations Act designated the complainant as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

1. United Brotherhood of Carpenters and Joiners of America; or
2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
 - (1) the Carpenters District Council of Toronto and Vicinity, or the
 - (2) Lake Ontario District Council, or the
 - (3) Western Ontario District Council, or the
 - (4) Ontario Acoustical and Drywall District Council; or
3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 572, 666, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 2050, 2222, 2451, 2466, 2480, 2482, 2486, 2965, 3227 or 3233 of the United Brotherhood of Carpenters and Joiners of America; or
4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journey-men and Apprentice Carpenters other than Millwrights,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

5. On March 3, 1978, the Minister of Labour pursuant to section 127(1)(a) of The Labour Relations Act designated the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America as the employee bargaining agency to represent in bargaining all journeymen and apprentice Carpenters other than millwrights, represented by the following affiliated bargaining agents:

1. United Brotherhood of Carpenters and Joiners of America; or
2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
 - (1) the Carpenters District Council of Toronto and Vicinity, or the
 - (2) Lake Ontario District Council, or the
 - (3) Western Ontario District Council, or the
 - (4) Ontario Acoustical and Drywall District Council; or
3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 572, 666, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 2050, 2222, 2451, 2466, 2480, 2482, 2486, 2965, 3227 or 3233 of the United Brotherhood of Carpenters and Joiners of America; or
4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent journeymen and apprentice carpenters other than millwrights,

(which Council and Unions are hereinafter collectively referred to as “the Unions”), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, bargaining as aforesaid in relation to bargaining rights of the Unions or any of them and the performance of work described in or covered by:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements between the Unions or any of them and any employers;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

6. There is no dispute that Jen-Mar Construction Limited (“Jen-Mar”) is represented in bargaining by the complainant in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and that Local 38 of the United

Brotherhood of Carpenters and Joiners of America ("Local 38") is represented in bargaining for all journeymen and apprentice carpenters (other than millwrights) by the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. Prior to April 30, 1978, Jen-Mar and Local 38 were bound by a collective agreement with respect to a geographic area within Ontario. This collective agreement covered the industrial, commercial and institutional sector of the construction industry. Art Varty at all material times was an officer, official or agent of Local 38.

7. The complainant and the employee bargaining agency were bargaining for a collective agreement with respect to carpenters and apprentice carpenters (other than millwrights) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The carpenters and apprentice carpenters who worked for Jen-Mar would be covered in the event that such a collective agreement is concluded. On July 4, 1978, the carpenters and apprentice carpenters who would be covered by such a collective agreement engaged in a strike which is lawful under The Labour Relations Act.

8. Mr. Jens Holm, one of the owners of Jen-Mar, has served on committees which were involved in the preliminary aspects of collective bargaining. More particularly, he served on the steering committee of the Labour Relations Bureau of the Ontario General Contractors Association. On February 23, 1978, Jen-Mar was admitted into membership of this association. On July 4, 1978, after the commencement of the lawful strike, Mr. Holm asked his foreman of carpenters what he had to do to keep his carpenters working. The foreman, who is active and knowledgeable in the affairs of Local 38, suggested that he call Mr. Varty on this matter. Mr. Holm followed this advice and telephoned Mr. Varty and asked him what he had to do to keep his men working. Mr. Holm and Mr. Varty met in St. Catharines during the morning of July 4, 1978, and Mr. Holm agreed to sign and did sign a document which Mr. Varty presented to him. The document, which is on the stationery of Local 38, reads as follows:

ACCEPTANCE OF AGREEMENT

BETWEEN:

(Hereinafter referred to as "The Employer")

– and –

Local Union 38 and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America

(Hereinafter referred to as "The Union")

- (1) The Employer and the Union hereby approve and accept the Agreement entered into between the employer bargaining agency designated by the Minister of Labour Pursuant to clause (a) of subsection 1 of Sec. 127 of the Labour Relations Act R.S.O. 1970, c.232, as amended and the Ontario Provincial Council of the United Brotherhood of Carpen-

ters and Joiners of America, a copy of which is to be filed with the Ontario Labour Relations Board.

- (2) The Employer and the Union agree that the Agreement referred to in Par. (1) above shall apply in all sectors of the Construction Industry as defined in Sec. 106(e) of the Labour Relations Act, save and except where the Employer is bound by a subsisting Collective Agreement with the Union pertaining to work performed in a certain sector or sectors of the Construction Industry.
- (3) There shall be an increase in rates of wages, Section 15.01 of 85¢ July 4th, 1978 and a further increase of 0%, November 1, 1978.

In witness whereof, we the undersigned parties, hereby attach our hands and seals to this agreement on this 4 day of July 1978.

ON BEHALF OF THE EMPLOYER	ON BEHALF OF THE UNION
Jen Mar Construction Limited	"Arthur P. Varty"
"Jens Holm"	

9. As a result of Mr. Holm's meeting with Mr. Varty and the signing of the document on July 4, 1978, the carpenters and apprentice carpenters returned to work for Jen-Mar on its industrial, commercial and institutional projects. They were paid at an hourly rate which was eighty-five cents an hour greater than the hourly rate which they were receiving on April 30, 1978. Mr. Varty also approached a number of other employers in the Niagara Peninsula which are represented in bargaining by the complainant. On July 4, 1978, Mr. Varty approached James Newman of Newman Brothers Company Limited and asked if that company would be interested in signing a collective agreement based on eighty-five cents an hour and that if this was done he would be interested in allowing the carpenters to work for Newman Brothers Company Limited. This offer was declined by Mr. Newman. On July 4, 1978, Mr. Varty approached Reginald Timms of R. Timms Construction and Engineering Limited and asked if he wanted to sign an interim agreement for an extra eighty-five cents or if he would like to forget the interim agreement and pay the extra eighty-five cents. Once again this offer was refused. A similar offer and refusal to sign occurred with respect to conversations on July 7, 1978, between Mr. Varty and William Benson of W. Benson & Sons Limited.

10. On July 19, 1978, after the appointment of a Labour Relations Officer, Mr. N. J. Harper, Jen-Mar agreed to cease and desist all carpentry construction in the industrial, commercial and institutional sector of the construction industry. Jen-Mar has abided by this agreement.

11. The complainant stated that the essence of the complaint was that the respondents have made an arrangement between Jen-Mar and Local 38 and that the admitted purpose of such an arrangement was to permit Jen-Mar to continue its work during the strike. It was stressed that the extra eighty-five cents per hour was to be paid with or without an interim agreement. The complainant adopted the position that the issue was whether such individual arrangements or attempts are permitted under The Labour Relations Act. It was argued that the purpose of section 133(1) is to conclude one collective agreement and that the conduct of Jen-Mar and Mr. Varty had contravened section 133(2) when they had bar-

gained for members of Local 38. The complainant drew analogies between the concept of province-wide bargaining and accreditation. Reference was made to the provisions of sections 119(1) and 119(2). The complainant requested a declaration that such arrangements as the one entered into between Jen-Mar and Local 38 be declared a violation of section 133(2) and also requested a declaration that the respondents cease and desist from engaging in violations of section 133(2) and refrain from bargaining or attempting to bargain contrary to The Labour Relations Act.

12. The respondents, other than Jen-Mar, argued that there was nothing in either the evidence or law whereby Mr. Varty could bind either the United Brotherhood of Carpenters & Joiners of America or The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America. It was stressed that there is a considerable difference between the wording of sections 119 and 133. The Board was urged not to treat provincial bargaining in the same manner as accreditation. The acceptance agreement was characterized as an agreement to agree and not as an agreement. It was argued that there was no undermining of the actual negotiation or signing of a provincial agreement. It was also argued that the existence of a written agreement could be regarded as an indication that Mr. Varty had not been bargaining. The existence of the written agreement was regarded as an indication that Mr. Varty had not been bargaining.

13. There is no evidence before the Board that Mr. Varty is an officer, official or agent of either the United Brotherhood of Carpenters & Joiners of America or the Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America or that these trade unions played any part in the sequence of events between Mr. Varty and various employers including Jen-Mar. Accordingly, this complaint is dismissed in so far as it related to the United Brotherhood of Carpenters & Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America.

14. Section 133(2) provides:

On and after the 30th day of April, 1978 and subject to section 127 and 132, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 1, and any collective agreement or other arrangement that does not comply with subsection 1 is null and void.

The question to be resolved by the Board is whether the conduct of Local 38, Mr. Varty and Jen-Mar Construction Limited has violated section 133(2). Did they bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement? Mr. Varty is an officer, official or agent of Local 38 and his acts within the scope of his authority to act on behalf of Local 38 are deemed by virtue of section 88(2) to be acts done or omitted by Local 38. On the evidence before it we find that Mr. Varty was acting within the scope of his authority to act on behalf of Local 38 and that his acts are deemed to be acts on behalf of Local 38. There is no question that Mr. Holm was acting on behalf of Jen-Mar.

15. Mr. Varty's conduct with respect to Jen-Mar and other employers in the Niagara Peninsula was an attempt to conclude another arrangement affecting employees represented by an affiliated bargaining agent, Local 38, other than a provincial agreement. The employer bargaining agency and the employee bargaining agency are in the process of endeavouring to conclude a province-wide collective agreement for carpenters and apprentice carpenters (other than millwrights) and Mr. Varty's conduct with respect to Jen-Mar has the effect of conferring a benefit on Jen-Mar which is not lawfully available to the employers who are represented in bargaining by the complainant. Mr. Varty and Jen-Mar briefly created islands of privilege whereby Jen-Mar and certain members of Local 38 were insulated from economic loss which other employers and other employees were to suffer as a result of a lawful strike. Such conduct by Mr. Varty and Jen-Mar is inherently destructive of the concept of province-wide bargaining. It causes disruption among the employers who are represented by the complainant and may well cause similar disruption among the affiliated bargaining agents who are represented by the employee bargaining agency.

16. Mr. Varty was not engaged in bargaining but he was engaged in concluding an arrangement affecting employees represented by Local 38. The arrangement consisted of the supply carpenters to Jen-Mar and the agreement or understanding to have Jen-Mar pay to the carpenters an extra eighty-five cents per hour. In our view it makes no difference whether the arrangement was reduced to writing or whether the "acceptance of agreement" is an agreement or an agreement to agree. The description of the document merely as an "acceptance of agreement" and the supply of carpenters on the understanding that they receive an extra eighty-five cents an hour is an arrangement affecting employees which is contrary to section 133(2) of The Labour Relations Act. While Mr. Varty was not, in our opinion, engaged in bargaining, his approach in trying to create islands of privilege is merely the precursor of *de facto* local bargaining.

17. It is true that sections 119(1) and 119(2) are more broadly cast than section 133(2). Sections 119(1) and 119(2) provide:

No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers' organization and no such employer or person acting on behalf of such employer, trade union or council of trade unions shall, so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers, bargain with each other with respect to such employees or enter into a collective agreement designed or intended to be binding upon such employees and if any such agreement is entered into it is void.

No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers' organization and no such employer or person acting on behalf of the employer, trade union or council of trade unions shall, so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers, enter into any agreement or understanding, oral or written, that provides for the supply of employees during a legal strike or lock-out, and if any such agreement or understanding is entered into it is void and no such trade union or council of trade unions or person shall supply such employees to the employer.

Sections 119(1) and 119(2) specifically prohibit individual bargaining and any arrangement that provides for the supply of employees during a legal strike or lock-out. While the provisions of section 133(2) are not as specific as the provisions of sections 119(1) and 119(2), their affect is by no means any less restricted in scope. Province-wide bargaining represents a far more complicated system of bargaining when compared to bargaining under a certificate of accreditation. Far more complex issues are potentially present in province-wide bargaining and the provisions of section 133(2) are to be interpreted in the light of various factual situations which may arise during such bargaining.

18. Having regard to the foregoing, we find that Local 38, United Brotherhood of Carpenters & Joiners of America, Art Varty and Jen-Mar Construction Limited have violated section 133(2) of The Labour Relations Act. We further find that the arrangement between them is null and void.

19. Having further regard to the foregoing, we direct pursuant to section 79(4) of The Labour Relations Act that Local 38, United Brotherhood of Carpenters & Joiners of America, Art Varty and Jen-Mar Construction Limited to cease engaging in actions which are in violation of section 133(2) of The Labour Relations Act.

DECISION OF BOARD MEMBER D. B. ARCHER:

I dissent. I see nothing wrong with the arrangement that was entered into by Local 38. It is merely a bargaining technique which is often used by either side to gain a particular advantage and is not restricted by the legislation.

1965-77-R Chatham Construction Workers Association, Local #53, affiliated with the Christian Labour Association of Canada, (Applicant), v. **Kent Acoustic Lathing & Drywall Limited**, (Respondent), v. United Brotherhood of Carpenters & Joiners of America, Local #494, (Intervener), v. Group of Employees, (Objectors).

Certification – Timeliness – Collective Agreement – Multisector collective agreement held to have expired insofar as it applies to the I.C.I. sector – Application for certification held timely

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *W.R. Herridge and A. Grootenboer for the applicant; Rene Alarie and James D. Wickett for the respondent; J. McNamee, Ian Logan and B. Roy for the intervener; no one appearing for the objectors.*

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER E. BOYER: July 21, 1978

1. The name “Kent Acoustic Lathing and Drywall” appearing in the style of cause

of this application as the name of the respondent is amended to read “Kent Acoustic Lathing and Drywall Limited”.

2. This is an application for certification filed pursuant to the construction industry provisions of The Labour Relations Act wherein the applicant is seeking to be certified to represent certain employees of the respondent in the Counties of Essex and Kent. The intervener submits that it is the bargaining agent of the employees affected by the application and that the application is untimely.

3. The intervener filed a number of documents in support of its contention that it has the bargaining rights for employees of the respondent. The first was an undated collective agreement between itself and the respondent wherein the two parties agree to bind themselves to the terms of an attached agreement between the intervener and the Windsor Construction Association, which agreement was stated to run from May 1, 1971 to April 30, 1973. This latter agreement, which covered the Counties of Essex and Kent, does not indicate on its face that it was restricted to any particular sector of the construction industry. Also filed was a second collective agreement between the respondent and the intervener dated September 3, 1975 whereby they agreed to bind themselves to another agreement between the intervener and the Windsor Construction Association, this one stated to run from May 1, 1975 to April 30, 1977.

4. The intervener also filed with the Board a one page document dated June 9, 1977 executed on behalf of the respondent and itself which purports to bind these two parties to another agreement between the intervener and the Windsor Construction Association. Unlike the prior two agreements which were filed with the Board, this document did not have attached to it the terms of a Windsor Construction Association agreement. Notwithstanding this, we are satisfied that the only agreement that this document could reasonably be referring to is yet another agreement between the intervener and the Windsor Construction Association, this one stated to operate from May 1, 1977 to April 30, 1978. The document actually signed by the parties states that it was to be binding only from the date of its execution onwards, that is from June 9, 1977.

5. On June 14, 1977 the respondent and the intervener signed an agreement whereby they agreed that the “foregoing” agreement between the Greater Windsor Home Builders Association and the union would be binding upon them from June 14, 1977 onwards. There is no “foregoing” agreement attached to the document which they executed, although the only agreement it could reasonably be referring to is a collective agreement between the Greater Windsor Home Builders Association Inc. and the intervener. The actual home builders agreement itself states that it is applicable to work performed in the residential sector in the Counties of Essex and Kent for the period of May 1, 1977 to April 30, 1979. To supplement this there was also filed an undated document signed on behalf of both the intervener and the respondent. The evidence of Mr. Ian Logan, who signed it on behalf of the intervener, indicates that like the preceding document it also was signed on June 14, 1977. This document appears to be the second page of a two page standard form collective agreement which provides that the parties will be bound by the terms of the aforementioned agreement between the Greater Windsor Home Builders Association Inc. and the intervener. The first page of the standard form agreement indicates that it is only to become operative on the date of its execution by the parties.

6. We are satisfied on the basis of the facts set out above that the respondent has in the recent past voluntarily entered into collective agreements with the intervener and that therefore the intervener does have bargaining rights for at least certain of the respondent's employees.

7. We now turn to consider the intervener's contention that the application, which was filed on March 22, 1978, is untimely. Counsel for the intervener contended that the residential collective agreement came into effect between the respondent and the intervener no earlier than June 14, 1977, and that pursuant to the provisions of section 44(1) of the Act the agreement would have been required to operate for at least one year, that is until June 14, 1978. With respect to employees in the other sectors of the construction industry he contended that the most recent agreement, which became effective on June 9, 1978, also would have been required to operate for at least a full year. This being the case, he concluded, the application had not been made within the last two months of the operation of either collective agreement as required by section 5 of the Act.

8. Were it not for the effect of section 132(2) of the Act we would agree with the position of counsel for the intervener on the question of the timeliness of the application, at least in so far as it relates to employees covered by the intervener's collective agreements. However, section 132(2), which was enacted as part of the recent amendments to the Act designed to implement a system of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry, states as follows:

Notwithstanding subsection 1 of section 44, every collective agreement in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause (e) of section 106 and represented by affiliated bargaining agents entered into after the 1st day of January, 1977 and before the 30th day of April, 1978 shall be deemed to expire not later than the 30th day of April, 1978, regardless of any provision respecting its term of operation or its renewal.

9. The effect of section 132(2) on the timing of displacement certification applications was discussed by the Board in *Malen Steel & Salvage Company Limited* File No. 1881-77-R decision of May 23, 1978 (as yet unreported) as follows:

"Section 132 must be read in the context of Bill 22 which deals only with the industrial, commercial and institutional sector of the construction industry. Accordingly, the Board reads section 132(2) as terminating a multi sector collective agreement, as is the agreement in this case, only in so far as it covers employees employed in the industrial, commercial and institutional sector. A multi sector agreement would continue to operate beyond April 30, 1978 in so far as it applies to employees employed in other sectors of the construction industry. In the result, the Board finds that the instant application is timely as it pertains to the bargaining rights covering employees of the respondent employed in the industrial, commercial and institutional sector but is untimely as it pertains to the bargaining rights covering employees of the respondent employed in the other sectors of the construction industry."

Likewise in the instant case, the multi-sector (non-residential) collective agreement between the respondent and the intervener expired on April 30, 1978 insofar as it related to employees engaged in the industrial, commercial and institutional sector, and therefore pursuant to section 5 of the Act, the application is timely with respect to employees in that sector of the construction industry who were covered by the collective agreement.

10. The applicant requested that the bargaining unit be described in such a way as to apparently include employees engaged in a number of crafts. At this point it is not clear to us whether the bargaining rights held by the intervener relate to all of these crafts. Further, the parties are in disagreement as to who was employed by the respondent in the Counties of Essex and Kent on the application date. In these circumstances we hereby appoint Mr. N. Harper, Labour Relations Officer, to meet with the parties and to inquire into and report back to the Board on the following, namely:

- (a) the list of employees employed by the respondent in the Counties of Essex and Kent on the application date,
- (b) the duties and responsibilities of each of these employees as well as their craft status
- (c) the question of which of these employees are represented for collective bargaining purposes by the intervener, and
- (d) the question of which of those employees represented by the intervener were employed in the industrial, commercial and institutional sector on the application date.

11. The decision of Board Member Ade will be forthcoming.

0286-78-R United Brotherhood of Carpenters & Joiners of America, Local 2486, (Applicant), v. **Manitou Mechanical Ltd.**, (Respondent), v. Group of Employees, (Objectors)

Certification – Constitutional Law – Employees engaged in installation of conveyor system in uranium mine – Board finding employment relationships within provincial jurisdiction

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members H.J.F. Ade and O. Hodges.

APPEARANCES: *Harold F. Caley and David Theriault for the applicant; Tom Lachance and Lloyd J. Valin for the respondent; Mervin J. Brown for the objectors.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES: July 20, 1978

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
2. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
3. The respondent raised a challenge to the constitutional jurisdiction of the Board in this matter. The respondent is a general contractor presently engaged in the installation of a conveyor system in an older section of Dennison Mine at Elliot Lake, Ontario. The respondent is under contract to Dennison Mines to perform this work. The carpenters and apprentices for whom the applicant seeks bargaining rights form a part of the crew assigned to this job by the respondent. They are assigned to form work and the constructing of beams as part of the installation project. The Dennison Mine is an actively producing uranium mine. The respondent takes the position that the labour relations of its employees who are working in the Dennison Mine are governed by the Canada Labour Code and accordingly, this Board has no authority to certify.
4. The respondent relies upon sections 91(29) and 92(10) of The British North America Act. By section 92(10) the legislatures of each province may exclusively make laws in relation to:

10. Local Works and undertakings other than such as are of the following classes, –
 - c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

The matters exempted from provincial authority under section 92(10)c are by virtue of Section 91(29) within the exclusive legislative authority of the Parliament of Canada.

5. Section 17 of the *Atomic Energy Control Act*, R.S. 1970, C.A.-19 states:
 17. All works and undertakings whether heretofore constructed or hereafter to be constructed,
 - A) for the production, use and application of atomic energy,
 - B) for research or investigation with respect to atomic energy, and
 - C) for the production, refining or treatment of prescribed substances, are and each of them is declared to be works or a work for the general advantage of Canada.

Section 2 of the same Act states:

2. In this Act

... "Prescribed substances" means uranium, thorium, neptunium, deu-

terium, their respective derivatives and compounds and any other substances that the Board may by regulation designate as being capable of releasing atomic energy, or as being requisite for the production, use or application of atomic energy.

6. It has been held by the courts that the *Atomic Energy Control Act* and the regulations made pursuant to it are within the jurisdiction of the Parliament of Canada to legislate for the peace, order and good government of Canada and that the production of raw materials for developing atomic energy is a work, undertaking or business within the legislative authority of the Parliament of Canada. (See *re Pronto Uranium Mines Ltd. v. O.L.R.B.* (1956) 5 DLR (2d) 342 and *Dennison Mines Ltd. v. A.G. of Canada* (1973) 1 OR 797. The *Pronto* decision (*supra*) held *The Industrial Relations and Disputes Investigation Act*, the predecessor legislation to the *Canada Labour Code* to be competent Federal legislation applying to employees employed upon or in connection with such work, undertaking or business. Section 2(a) of the *Canada Labour Code* defines a Federal work, undertaking or business as including any work that “although wholly situated within a province is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada.” Section 108 of the *Canada Labour Code* delimits the coverage of Part V of the code in the following terms:

“This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers’ organizations composed of such employees or employers.”

7. If the employees of Manitou Mechanical Ltd. who are engaged on the Dennison project are found to be “employed upon or in connection with the operation of” the Dennison Mines, clearly the labour relations of these employees is regulated by the *Canada Labour Code* and not by the *Ontario Labour Relations Act*. If, however, they are found not to be “employed upon or in connection with the operations of” the Dennison Mine, then clearly their labour relations are regulated by the *Province of Ontario* and they are subject to the *Ontario Labour Relations Act*.

8. In the leading *Eastern Canada Stevedoring Co. Ltd.* decision (1955) S.C.R. 529, (1955) 3 D.L.R. 721, the Court held that the words “employed upon or in connection with the operation of any work,

“... must [not] be construed to include more than that which would form an integral part or be necessarily incidental to the work, undertaking or business that was within the legislative competence of Parliament.”

The court found that the loading and unloading of freight from the steamships was a necessary and integral part of the steamship operation and therefore subject to the legislative jurisdiction of the Federal Parliament. The test which was used and which has been followed in a number of subsequent cases was a functional one. See *re Murray Hill Limousine Service Limited* (1965) B.R. 778 (Que. Q.B.) and *Colonial Coach Lines Ltd. and Ontario Highway Transport Board*, 62 D.L.R. (2d) 270 (Ont. H.C. 1967). In these cases the courts looked to see whether the work in question was necessary or reasonably required for the operation of the undertaking falling within Federal jurisdiction.

9. Two court decisions have particular application to the matter at hand. In *re Bachmeier Diamond and Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill and Smelter Workers Local #913* (1962) 35 D.L.R. (2d) 241 the Saskatchewan Court of Appeal held the labour relations of a company under contract to Eldorado Mining and Refining Limited, "to do core and percussion drilling in the mine of Eldorado for the purpose of developing presently known bodies of uranium ore and exploring for presently unknown bodies of uranium ore", to be within provincial jurisdiction. The court stated:

"There is nothing in the material to show that diamond and percussion drilling being done by the applicant company is either an integral part of or necessarily incidental to the production, refining or treatment of uranium ore."

The work of the appellant in the above cited case would appear to be more directly related to the actual operation of a uranium mine than the work of the respondent in the instant case and yet the court found that it was not sufficiently integral to or necessarily incidental to the production, treatment or refining of uranium ore as to be brought within federal jurisdiction.

10. In *Vipond Automatic Sprinkler Co.* 67 D.L.R. (3d) (Alta. S.C. 1976) the Court distinguished between construction activity and work or activities that might otherwise be integral to activity falling within the federal head. The applicant union in the *Vipond* case contended that the Alberta Board of Industrial Relations did not have the jurisdiction to deal with a particular labour problem that arose at the Calgary Air Terminal among employees engaged in construction work for Vipond Sprinkler Co. One of the arguments of the applicant was that an aerodrome is a federal work under s. 2(e) of the Canada Labour Code and that these employees were employed upon a federal work and thus came within s. 108(1) of the Canada Labour Code. The Court held that the word "upon" relates to the word "operation" and it should be read "employed upon ... the operation of any federal work. That is, it must be understood in the sense that the employees were engaged in the operation of the aerodrome."

11. The Canada Labour Relations Board has itself applied the functional test on the basis suggested in the *Eastern Canada Stevedoring Co. Ltd.* decision (*supra*) and has declined jurisdiction in two cases where the work in question is analogous to that at issue in the instant case vis-a-vis its relationship to a Federal undertaking. In *re General Enterprises Ltd.* (1977) C.L.L.C. 16,084, the Canada Board applied the functional test and concluded that although the company was performing construction work on two federally administered highways in British Columbia its work was not an integral part of the Federal undertaking. The Canada Board said in that case:

"This is not the case before us. General Enterprise is merely performing specific construction tasks, in British Columbia for fixed durations. It is a contractor that, for a period, under one of its contracts works on these highways. It is building the physical entity that will be the subject of the federal undertaking – administration and control. We do not think that this employer's construction activity has the necessary identity with the federal undertaking to come within federal regulation of the labour relations with respect to undertaking. It is involved in a new construction of a portion of

the Carcross-Skagway Highway, a new sixteen miles of the Alaska Highway to replace existing highway and new bridge protection work. Its involvement is temporary and not of the degree to come within federal jurisdiction.”

In re *R.C.A. Victor Employees' Association v. R.C.A. Victor Company* (1968) C.L.L.C. 16,040, the Canada Board refused jurisdiction on the basis that the repairs and installations of telecommunication and microwave systems, the work being performed by the employees in question, was not an integral part of nor was it necessarily incidental to the operations of the communications systems.

12. Reference should also be made to re *Lummus Canada Limited*, [1975] OLRB Rep. Oct. 773 and *Rondar Services Limited*, decision dated April 10, 1978. In the *Lummus* case (supra) the Ontario Board found that the construction of a plant within Ontario, albeit one which would be connected to a pipe line originating outside of Ontario, was a local work or undertaking within provincial jurisdiction. In the *Rondar* case (supra) which is closely analogous to the instant case, the Ontario Board found that the repair and maintenance of testing equipment used in a Federal undertaking, under contract from the Federal undertaking,

“... constitutes a casual service to the operations of C.C.I.W. and that the operation carried on by the respondent, so far as it relates to C.C.I.W. is neither ‘truly ancillary’ nor ‘necessarily incidental’ to the Federal jurisdiction under section 91(10) and (12).”

13. A review of the cases establishes that the courts, the Canada Labour Relations Board and the Ontario Labour Relations Board have been careful to distinguish between a Federal undertaking, on the one hand, and construction, installation or repair work carried on by outside contractors in connection with a Federal undertaking, on the other. It has been consistently found that the latter does not form an integral part of nor is it necessarily incidental to the work, undertaking or business that is within Federal jurisdiction. The application of the functional test in this case leads to the conclusion that the work in question is neither an integral part of nor is it necessarily incidental to the operation of the Dennison Mine. Although the conveyor system, when installed, will be an integral part of the Dennison mining operation, the installation itself is not “an integral part of or necessarily incidental to the production, refining or treatment of uranium ore.” In the result, the Board is satisfied that it has the jurisdiction to proceed in this matter.

15. Having regard to the agreement of the parties, the Board further finds that all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. The union challenged the employee lists submitted by the respondent employer and argued that they failed to show the names of a number of persons who worked as carpenters or carpenters’ apprentices on the day of the application. The respondent took the position that these persons were welders or labourers. If the respondent’s position is correct and the employee lists are accurate, the statement of desire filed by the objectors carries a sufficient number of overlapping signatures as would cause the Board to inquire into its origination, preparation and circulation.

16. The Board heard evidence as to the origination, preparation and circulation of the statement. The petition was circulated on company premises during working hours by an employee who described himself as a foreman and did not deny that he had been introduced to the employees as a foreman. He does not work with the tools of the trade and the evidence establishes that he has verbally disciplined bargaining unit employees. In the circumstances, the Board finds that the statement of desire does not represent the voluntary wishes of those who signed it. The Board is of the view that those who signed the document would have identified the person circulating it with management and, having regard to the sensitive nature of the employer/employee relationship, might not have expressed their true wishes. The Board has not been satisfied on the evidence that the document represents the voluntary wishes of those who signed it and accordingly, the Board can give it no weight.

17. This being the case, the dispute as to the accuracy of the employee lists is academic.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 18, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER H.J.F. ADE:

The decision of H.J.F. Ade is to follow.

0219-78-R Christian Labour Association of Canada, (Applicant), v. Mortlock Construction (1963) Limited, Mortlock Construction (1978) Limited, **Mortlock Enterprises Limited**, (Respondents).

Sale of a Business – Company acquiring assets, business premises and key management personnel from predecessor and continuing in same business with virtually identical name – Board found a sale within the meaning of the Act

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members W.F. Rutherford and W.H. Wightman.

APPEARANCES: *Owen V. Gray and John Adema for the applicant; R.C. Fillion, A. Mortlock and W. Mortlock for the respondents.*

DECISION OF THE BOARD: July 21, 1978

1. The name “Mortlock Enterprizes” appearing in the style of cause of this applica-

tion as the name of one of the respondents is amended to read "A. Mortlock Enterprises Limited".

2. This is an application under section 55 of The Labour Relations Act wherein the applicant seeks a declaration that a sale of a business has taken place and that it has bargaining rights for the employees of the respondents.

3. Mortlock Construction (1963) Limited ("the 1963 Company") was formed in 1963 by Mr. Albert Mortlock to operate as a general contractor in the construction industry in and about the City of Peterborough. One of Mr. Mortlock's sons, William, worked for the company as project manager and was responsible for the operation of the company in his father's absence. Albert Mortlock described his son William as his "2I.C.". It is clear, however, that William was neither a director nor shareholder of the firm. The 1963 company also employed two more of Mr. Albert Mortlock's sons. One, Tom Mortlock, worked for the company as its estimator, while the other, Bob Mortlock, was employed as a carpenter.

4. Rounding out the 1963 Company's senior staff was its office manager who also served as bookkeeper and secretary. In the field the company generally employed some 12 to 15 employees. During the winter months most of these employees would be laid off, although the company would generally retain in force certain health and medical benefits for them, being reimbursed for the cost of doing so by the employees in the spring.

5. The 1963 Company operated out of rented office space although it also made use of a shed for maintaining its tools such as saws, picks and wheelbarrows. The company owned two one-half ton trucks but no heavy construction equipment. Whenever such equipment was required it would either be rented or the work involved would be sub-contracted out.

6. Mr. Albert Mortlock testified that in October of 1977 he decided to retire from the construction business, but to use his company to continue to hold his investments. An application was filed by the 1963 Company with the Ministry of Consumer and Commercial Relations to amend its articles of incorporation so that one of its objects would now be to purchase or otherwise acquire and to hold real and personal property, including bonds, debentures, shares of all classes and securities of all kinds. The application also requested that the name of the 1963 Company be changed to A. Mortlock Enterprises Limited. These changes to the articles of incorporation became effective on March 17, 1978. According to Mr. Albert Mortlock, A. Mortlock Enterprises Limited holds a number of debentures and other financial investments, as well as certain properties which are leased out, apparently on a lease back basis.

7. At the time of the change in name of the 1963 Company it was still engaged in the completion of two construction projects. One of these was almost completed in February of 1978 but its final completion had to wait until the spring because of bad weather. The contract for the other job, involving certain renovations to St. Joseph's Hospital, was not obtained until December of 1977 and work on the project did not commence until March 28, 1978. At the time of the hearing this job had not yet been completed. In completing these two jobs the company used the name Mortlock Construction (1963) Limited, even though it had formally been changed to A. Mortlock Enterprises Limited. Hereinafter the construction operation of this company will continue to be referred to as the 1963 Company.

8. At about the same time as the 1963 Company applied to have its name changed filings were made with the Ministry of Consumer and Commercial Relations on behalf of Mr. William Mortlock to incorporate a company to be known as Mortlock Construction (1978) Limited, ("the 1978 Company") with himself as the sole shareholder. In order that the 1978 Company could use the Mortlock Construction name the 1963 Company filed with the Ministry of Consumer and Commercial Relations a consent to the use of the name. Mr. Albert Mortlock testified that he signed the consent form at the same time that he signed the documents to change the name and objects of the 1963 Company. The 1978 Company formally came into existence on March 17, 1978. All of the legal work related to the change in name of the 1963 Company and the incorporation of the 1978 Company was handled by the same lawyer.

9. William Mortlock obtained the funds required to operate his company by way of a loan from A. Mortlock Enterprises Limited.

10. Since the beginning of its operations the 1978 Company has made use of the tools belonging to the 1963 Company. It was explained at the hearing that once the 1963 Company has completed its remaining contract the 1978 Company will purchase from the 1963 Company its tools, trucks and office equipment, all at book value. At the time of the hearing no final inventory had been taken of these assets, but both Albert and William Mortlock estimated their total book value at about \$10,000. Mr. William Mortlock also indicated that the 1978 Company would continue to use the tool shed.

11. Both the 1963 Company and the 1978 Company have been operating out of the same office premises, although Mr. Albert Mortlock testified that once the 1963 Company finished its final contract he would be moving out of the premises. At the time of the hearing the rent on the office was still being paid by the 1963 Company, although it was anticipated that the 1978 Company would shortly begin paying the rent. At the time of the hearing the office manager was performing work for both companies, with his salary being shared jointly by the two. The 1978 Company has acquired a separate telephone, but both telephones are answered by the office manager with the words "Mortlock Construction". William Mortlock testified that when the 1963 Company goes out of business Bell Canada will be asked to route all calls from its telephone number to the 1978 Company's telephone number.

12. Mr. Tom Mortlock, the estimator, was by the time of the hearing being paid by the 1978 Company. However, he actually began to do work on the preparation of bids for the 1978 Company prior to being taken off the 1963 Company's payroll, and apparently this was also true for Mr. William Mortlock himself. Certain benefits for the senior staff were paid for by the 1963 Company until June 1, 1978 when the 1978 Company became responsible for them. An informal agreement exists between Albert and William Mortlock that at some point in the future an adjustment for salaries and benefits will be made between the two companies.

13. The 1963 Company terminated most of its employees in the winter of 1977-78, and did not continue their benefits. A number of these employees were recalled by the 1963 Company, however, to work on its remaining contracts, although it appears that most of those who were recalled were again laid off at some point. At the time of the hearing the 1963 Company was still employing two men on its final project. The 1978 Company em-

employs seven men in the field, all of whom were formerly employed by the 1963 Company. Most of these men were apparently contacted in the spring by William Mortlock to come and work for him. However, Mr. Kenneth Scott, a long service employee with the 1963 Company testified that he was working for the 1963 Company when he was directed by his foreman to report along with the foreman to a 1978 Company jobsite. Mr. Scott testified that his pay rate and benefits are the same with the 1978 Company as they were with the 1963 Company. An interesting development with respect to the employees is that in April of 1978 the 1963 Company "borrowed" three men from the 1978 Company for periods of between three and six days to work on its St. Joseph's Hospital project. The men were paid by the 1963 Company for this time.

14. The 1978 Company acts as a general contractor in the construction industry. The work it has been doing was obtained in the name of the 1978 Company, although with respect to certain of its bids Mr. Albert Mortlock was asked to give advice on labour cost figures. Some, but not all, of the contracts obtained by the 1978 Company were with companies or agencies for whom the 1963 Company had at one time or another done some work. Mr. Albert Mortlock testified that he visited some of the 1978 Company's jobsites, and that when asked for advice he offered it. It is clear, however, that Albert Mortlock has no position in the 1978 Company, and possesses no authority to direct its operations.

15. With respect to the name of the 1978 Company, Mr. William Mortlock testified that while he had considered adopting another name he kept the Mortlock name since it is well known and respected in Peterborough. Mr. Albert Mortlock in cross-examination agreed that the 1963 Company was often referred to in the trade simply as "Mortlock Construction".

16. The applicant trade union has held bargaining rights for employees of the 1963 Company since 1973. It is now seeking a declaration that there has been a sale of the business of the 1963 Company to the 1978 Company, and that therefore it is the bargaining agent for the employees of the 1978 Company.

17. The position of the respondents is that no sale of a business has occurred. It is submitted that while some assets have been, or will be, transferred to the 1978 Company it is a new entity which has hired its own employees and obtained its own contracts. Respondents' counsel also noted that there was no transfer of any contracts between the two companies, and that A. Mortlock Enterprises Limited continues to operate.

18. The question facing the Board is whether the business of the 1963 Company (or to be more accurate the business of A. Mortlock Enterprises Limited which for certain purposes is operating as Mortlock Construction (1963) Limited) has been sold to the 1978 Company. It is to be noted that section 55(1) of the Act defines a sale very widely so that it includes "leases, transfers and any other manner of disposition."

19. The fact that A. Mortlock Enterprises Limited is carrying on certain financial operations and that under the name of the 1963 Company it is still engaged in certain operations in the construction industry is not determinative of the question as to whether or not there has been a sale of a business. Section 55(1) (b) of the Act defines a business to include part of a business, and thus the possibility exists that there has been a sale of only part of the business of the Mortlock Enterprises - 63 Company.

20. Counsel for the respondents in contending that there had not been a sale of a business put great emphasis on the fact that no contracts were transferred from the 1963 Company to the 1978 Company. We agree that this is a factor which suggests that there has not been a disposition of the business of the 1963 Company to the 1978 Company. However, we believe a number of other factors must also be taken into consideration.

21. The 1978 Company is operating out of the same premises used by the 1963 Company. Further, the assets of the 1963 Company have been, or are about to be, sold to the 1978 Company. The result of this is that the business of the 1978 Company is being, and will continue to be, performed out of the same location and with the same office furniture and tools as utilized by the 1963 Company.

22. Important to the success of any contractor in the construction industry is the know-how and experience of its key people. With respect to the 1963 Company the key people involved in obtaining contracts and ensuring that the work was performed properly were Albert, William and Tom Mortlock, while the functioning of the office was left primarily in the hands of the office manager. With the exception of Mr. Albert Mortlock, who is retiring from the construction industry, all of these people now work for the 1978 Company. Further, there appears not to have been any clear break between when they stopped working for the 1963 Company and started with the 1978 Company. Both William and Tom Mortlock began working on bids for the 1978 Company while still on the payroll of the 1963 Company. The office manager was at the time of the hearing still doing work for both companies, and it was only as recently as June 1, 1978 that the 1978 Company became responsible for the cost of the benefits for these people. In effect there seems to have been simply a gradual movement of the key personnel from the 1963 Company to the 1978 Company. The result of this movement has been to transfer all of the experience and managerial strengths of the 1963 Company (with the exception of course of Mr. Albert Mortlock) over to the 1978 Company. It is also the case that the entire work force of the 1978 Company is comprised of former employees of the 1963 Company.

23. The similarity between the names of the 1963 and the 1978 companies is inescapable. It was always open to William Mortlock to incorporate a company using a different name, including something along the lines of "William Mortlock Limited." Rather than do this, however, he opted for the name "Mortlock Construction (1978) Limited", a name so similar to that of the 1963 Company that before the 1978 Company could adopt it consent for its use had to be obtained from the 1963 Company. The reason behind this choice of names would appear to be so that the 1978 Company could take advantage of the reputation and good name associated with the 1963 Company, a company often referred to in the trade simply as Mortlock Construction.

24. In summary, at some point early in 1978 all new contracts were bid on and performed in the name of the 1978 Company. However, the work involved, right from the preparation of the initial bids through to the physical work in the field, has been performed by the same people working out of the same premises and utilizing the same tools as was done with bids placed by the 1963 Company. With the exception of the retiring Albert Mortlock all of the key people involved in the operation of the 1963 Company, with their experience and abilities, are to be found in the 1978 Company. In reality, it appears to us that the business of the Company is the same in every respect as the business conducted by the 1963 Company prior to its reorganization, except that now the business is owned by William Mortlock instead of his father Albert.

25. In *Marvel Jewellery Limited* [1975] OLRB Rep. Sept. 26, the Board made the following comments concerning section 55 of the Act:

Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

The question in each case is whether there has been a transfer of the functions carried on prior to the sale or, put more simply, whether there has been a continuation of the business. This question must be answered by examining the totality of the transaction, and not just by glancing at the outward form of the transaction.

26. In this case we are satisfied that the business of the 1963 Company involving the obtaining and completing of contracts is continuing. We are also satisfied that apart from that part of its operations which were required to complete certain outstanding contracts, the business was transferred or otherwise disposed of to the 1978 Company and that this amounted to a sale within the meaning of the Act.

27. In accordance with the above determination, the Board declares that there has been a sale of a business from A. Mortlock Enterprises Limited, (formerly, and also for certain purposes operating as, Mortlock Construction (1963) Limited) to Mortlock Construction (1978) Limited. It follows from this declaration that the Christian Labour Association of Canada is the bargaining agent for certain employees of Mortlock Construction (1978) Limited in accordance with the provisions of sub-section (2) or (3) of section 55, whichever may be applicable.

0658-78-U The Ontario-Minnesota Pulp and Paper Company Limited, (Applicant), v. The Lumber & Sawmill Workers' Union, Local 2693; Tulio Mior, John Lorenowich, B. Anderson, D. Anderson, R. Anderson, G. Aveyard, B. Brown, E. Cates, K. Desserre, G. Elliot, J. Falloon, L. Fletcher, D. Georgeson, W. Johnson, L. LaBelle, Raymond Loveday, E.H. Mathewson, A. McClain, G. McClain, N. Meyers, W. Nelson, H. Olson, R. Pearson, B. Penney, A. Shrumm, E. Shrumm, R. Steele, Calvin Adams, Richard Adams, Terry R. Adams, Frank T. Advent, James Banks, George W. Barrett, George Barrett Jr., Robert Bombay, Miles Brown, Nelson E. Brown, Edward Calder, Garnet Councillor, Frederick Crowe, Nick Eluik, Melvin Fletcher, Murray Gallinger, John George, Wayne A. George, Leslie Johnson, Richard Johnson, Melvin Kallstrom, Harold I. Kellar, Janos Koles, Ronald Korpi, Richard Laquerre, Emmanuel Liontas, Harold McGinnis Sr., Ronald McGinnis, James McLeod, Arnold McPherson, John Morrin, Donald Munro, Leonard B. Munro, Joseph Natawence, Gerald Olson, Terry Oster, Leslie A. Pattison, Dennis G. Perrault, Gilbert T. Perreault, Gregory Perreault, Ralph Pietila, Paul Ronan, Donald Rose, Darrell E. Scott, Fred J. Smith, James Tkachyk, William Wayash, Steve Both, Dennis Duhamel, James Finch, Raymond Jewell, Garnet Kellner, John E. McAsey, Bruce Pentney, T. Pettis, Peter Voss, Robert Rousseau, Bernard Armstrong, Melvin B. Armstrong, William Derendorf, James H. George, Gerald Loveday, Thomas A. Miller, Michael A. Renberg, Donald E. Woods, Glen Bergner, Frances Brigham, Roy Doucette, Colin French, Herbert George, V. Guimond, Norman Lockman, Gerald Loughheed, John Scott, Ronald Tucker, Philip R. Williamson, John Deschamps, Robert Loveday, and Charles R. Morken, (Respondents).

Strike – Strike over work reorganization during collective agreement held illegal

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *David I. Wakely and William C. KcKinnon for the applicant; Laurence C. Arnold and Tulio Mior for the respondents.*

DECISION OF THE BOARD: July 20, 1978

1. The applicant has applied to the Board for relief under section 82 of The Labour Relations Act.
2. In a decision dated July 12, 1978, the Board dismissed this application in so far as it related to Raymond Loveday because the applicant had not provided the correct address for Raymond Loveday for the purpose of service. In addition, the Board dismissed the applicant's request for relief with respect to The Lumber & Sawmill Workers' Union, Local 2693 ("Local 2693"), Tulio Mior and John Lorenowich. The Board directed the remaining

respondents to forthwith cease and desist from engaging in an unlawful strike. The Board stated that reasons for the decision dated July 12, 1978, would be given in writing. These reasons are now set forth.

3. The applicant is a producer of pulp and paper in Ontario and operates in various divisions. The application for relief was made with respect to the applicant's woodlands operations in the vicinity of Fort Frances. The applicant and Local 2693 are parties to a collective agreement which became effective September 1, 1976, and remains in effect until August 31, 1978. There is no dispute that the applicant's woodlands operations in the vicinity of Fort Frances are covered by this collective agreement. The cessation of work which gave rise to this application commenced on July 5, 1978, and was still in effect on July 12, 1978, which was the date of the hearing of this application.

4. The individual respondents, other than Tulio Mior and John Lorenowich, are or were employees of the respondent on July 5, 1978. The applicant and Local 2693 have been parties to successive collective agreements for two decades. Prior to July 5, 1978, the employees who are affected by this application were employed by the applicant and were paid an hourly rate for their work of cutting and skidding, and for their work in garage and hauling operations in Camps M-404 and M-405.

5. Prior to and during May of 1978 the applicant began to encourage its employees who were engaged in cutting and skidding to change from being paid an hourly rate for their work to being paid on a piecework basis. Under the system of being paid an hourly rate the applicant provided employees engaged in cutting and skidding with power saws and wheeled skidders (tractors) with which to perform the work. The applicant purchased such equipment and maintained it at its garages. Under the proposed system of piecework the applicant proposed to sell to each employee power saws at cost and three year old tractors at a book value of six thousand dollars. In addition, under the proposed system, the employees were required to repair and maintain their saws and tractors. The applicant actively encouraged employees to become pieceworkers and Mr. Stanley Zuke, the applicant's general logging superintendent, received inquiries from employees who were interested in learning the details of becoming pieceworkers. It was the applicant's position that piecework would lead to increased productivity and that this would strengthen its competitive position. It was also the applicant's position that the earnings of employees who became pieceworkers would be increased from an average of twenty-two thousand dollars a year to an average of thirty-two thousand dollars a year.

6. Mr. Mior, Mr. Lorenowich and many members of Local 2693 viewed the applicant's encouragement of employees to become pieceworkers from a different perspective and saw in the applicant's proposals the re-introduction of methods of work which had given rise to strong differences between the applicant and Local 2693 some twenty years ago. In brief, Local 2693 feared that the system of piecework would lead to a reduction in the average annual earnings of the employees.

7. The applicant offered to sign an agreement with any employee who wished to purchase one of its tractors for six thousand dollars. The employee was required during the first year to use the tractor in connection with cutting and skidding for the applicant and not to sell the tractor to anyone other than the applicant for this period of one year. During this period of time the applicant agreed to purchase the tractor from the employee for six

thousand dollars. It was the respondents' position during the hearing that the applicant through its management personnel sought to exert pressure on the employees to become pieceworkers and that there were threats that the applicant would close down its operations in the area of Fort Frances if the employees did not become pieceworkers. The evidence before the Board does not disclose a single instance where the applicant's management personnel either exerted any pressure on its employees to become pieceworkers or threatened the continued employment of any of its employees. The apprehension in the minds of the respondents, or at least some of them, was that what started out as a voluntary system of becoming a pieceworker where the supplying of equipment (such as power saws and tractors) was not a condition of employment would mature into a compulsory system of becoming a pieceworker where each employee would be required to supply his own equipment.

8. In a letter dated May 15, 1978; Mr. William Wesley, the Woodlands manager of the applicant, advised Mr. Mior, the president of Local 2693, as follows:

In accordance with the labour agreement between L.S.W.U., Local 2693 and this Company, "Other Understandings Reached" section IV, Wage Schedule item 1) (c), this is to inform you that we plan on establishing piecework operations with employee owned equipment in our Camp L-314 operation on May 23rd, 1978.

The operator going in will be doing so on his own volition, and the supplying of equipment has not been a condition of employment.

9. On May 24, 1978, Mr. Mior released the following special letter to all members of Local 2693 employed by the respondent in its Woodlands operations:

Dear Brothers:

It has been brought to my attention, that Management and Supervision of the Company, have been attempting recently, to entice Members of this Union, to provide them (Company), with equipment, in particular, wheeled skidders (Tractors), on cut and skid operations, and also, to agree to piecework rates in conjunction with their employee-owned or leased (wheeled skidders) equipment.

ON THE PART OF THE COMPANY:

This action, on the part of the Company, is a flagrant violation of the Agreement reached on this matter in May of 1959, and which is still in full force and effect.

Since that date, succeeding Management and Supervisory Personnel, had attempted to violate the Understandings and Agreement thereto, on a few known occasions [sic], but removed from their operations, this employee-owned equipment and discontinued paying on a piecework or contract basis, upon the Union instituting grievances on these violations.

ON THE PART OF THE MEMBER:

Any employee, other than those excluded by the Agreement, who permits himself to be bamboozled by the Company, and does under any disguise, provide The Company with such equipment and/or enters into an Agreement to be paid on a piecework or contract basis, not only violates the Agreement between the Company and the Union, but also is in violation of the Constitution and Laws of the United Brotherhood, and the By-Laws of Local 2693, and thereby, renders himself liable to charges and if convicted, to a fine or expulsion.

REMEMBER: – Your Brothers employed on the Reed Ltd. Woods Operation, went on **STRIKE** for (**10 WEEKS**), to block that Company from engaging employee-owned equipment on their cut and skid operations, and entering into piecework or contract basis of payment (Packsackers).

Do not fail them, –

By failing yourselves!

10. In a letter dated June 7, 1978, Mr. L. F. Lounder, Canadian Woodlands manager, released the following letter:

TO: ALL WOODLANDS EMPLOYEES

In order to develop a more efficient operation, while at the same time provide our employees with the opportunity for a better earnings potential, we have been encouraging our employees to go to owner-operator, tree length piecework cutting and skidding operations, on a voluntary basis. We sincerely believe it will be a beneficial change for both the employees and the Company.

The utilization of owner-operator skidders isn't a new departure from our method of tree length cut and skid operations, as it has been in constant use to some degree on our operations since prior to 1959.

ON THE PART OF THE COMPANY

In keeping with the intent and understanding of the agreement, we officially informed the Union by letter on May 15, 1978 that we intended moving an employee into Camp L314 to commence piecework operations on May 23rd. The employee was prepared to supply his own skidding equipment on his own volition, without it being made a condition for employment.

The employee in question commenced cutting at Camp L314 but in light of statements made to him orally by Union representatives, as well as statements contained in the "Special Letter" of May 24, 1978 "to all members of Local 2693, employed by The Ontario-Minnesota Pulp and Paper Company Limited, in their Woodlands Operations" as signed by

T. Mior, President, the employee has temporarily withdrawn from this operation.

ON THE PART OF THE UNION

The Union claims the action on the part of the Company is a flagrant violation of the Agreement reached in May of 1959 and which still is in full force and effect.

As a consequence, in the "Special Letter" of May 24, 1978, the Union makes the following statement:

"On the part of the member":

Any employee, other than those excluded by the Agreement, who permits himself to be bamboozled by the Company, and does under any disguise, provide the Company with such equipment and/or enters into an agreement to be paid on a piecework or contract basis, not only violate the Agreement between the Company and the Union, but also is in violation of the Constitution and Laws of the United Brotherhood, and the By-laws of Local 2693, and thereby, renders himself liable to charges and if convicted, to a fine or expulsion".

The Company considers the actions of the Union to be contrary to the terms of our collective agreement. These terms are not new, they have been in effect since the settlement reached with the Union in 1959. We have confirmed that all understandings reached in those negotiations are spelled out in the agreement. The obligation of the company consists basically of prior notification to the Union of intent to move equipment into operations where none are presently located.

The Company considers the position which the Union has taken with our employees to be in violation of the collective agreement. In addition, the Union's action constitutes an unlawful interference with Company employees. We wish to assure all employees considering such owner-operator piecework operations that the company will fully support and stand behind any employees who are concerned about the Union's stated position as outlined in their letter of May 24. We will continue to encourage employees to engage in owner-operator piecework operations.

We see the owner-operator concept as a positive step towards improving our productivity which will in turn help our competitive position in the industry. In addition such operations will be financially beneficial to those of the cutting force who wish to convert to these operations.

Attached as Appendix "A" are the sections of the current agreement provisions which relate to this situation.

We are looking forward to working with you in this matter and hope that you will show your continued interest in going to an owner-operator operation by contacting your immediate supervisor.

An appendix was attached to this letter where reference was made to the provisions of the collective agreement which the applicant regarded as relating to its right to commence owner-operator, piecework cut and skid tree length operations.

11. On June 7, 1978, Mr. Lounder wrote the following letter to Mr. Mior:

Our employees have provided us with a copy of your "Special Letter" of May 24th, 1978 relative to equipment, and in particular, wheeled-skidders (tractors) on cut and skid operations. We are most concerned with the content of the letter and its effect on our employees and our operations.

We have confirmed that the total commitment on this point as agreed upon in the 1959 negotiations set out in the current collective agreement. This provides that the Company will –

1. – (c) – inform the Union in advance if it plans to move employee-owned equipment into operations where none are presently located.
2. The Company reiterates that ownership of tractors is not to be made a condition of employment.

In the instance of the start-up of piecework operations at Camp L314 on May 23rd, we advised your office prior to that date, of our intention to commence operations and noted that the employee concerned was to supply his own skidder on his own volition. We have been advised subsequently by your letter of May 24 to all company woodlands operations employees, and by the employee concern [sic], that the Union has taken the position that employees who proceed with owner-operator equipment are in violation of the constitution and laws of the United Brotherhood and the bylaws of Local 2693 and thereby render themselves liable to charges and if convicted, to a fine or expulsion from the Union.

Our agreement specifically provides: – "that the negotiations of a rate for supplying the tractors supercedes the union bylaw on tractor ownership and that, for this reason, employees of the Company are not subject to Union suspension for supplying their equipment to the Company on the negotiated basis."

The Company's actions are proper and in accordance with the collective agreement. On the other hand, the Union's stated position with our employees is in violation of the collective agreement and constitutes an unlawful interference with our employees and our business.

It is our intention to proceed with our operations and in accordance with our collective agreement.

We would ask that the union and its representatives discontinue this unlawful interference with our employees and our business or we shall have no alternative but to seek the necessary legal remedies. Hopefull [sic] this will be unnecessary.

For your information, we enclose a copy of a letter which we are circulating to our woods employees which we feel is appropriate and timely to explain our position to them.

12. On June 21, 1978, Mr. A. K. Fisher, the applicant's Woodlands manager, wrote the following letter to Mr. Mior:

In accordance with the labour agreement between L.S.W.U., Local 2693 and this Company, "Other Understandings Reached" section IV, Wage Schedule item piecework operations with employee owned equipment in our Camp M-404 operation on June 26, 1978.

The operator going in will be doing so on his own volition, and the supplying of equipment has not been a condition of employment.

- On June 26, 1978, Mr. A. K. Fisher wrote a similar letter to Mr. Mior which stated:

In accordance with the labour agreement between L.S.W.U., Local 2693 and this Company, "Other Understandings Reached" section IV, Wage Schedule item piecework operations with employee owned equipment in our Camp M-405 operations on July 3, 1978.

The operator going in will be doing so on his own volition, and the supplying of equipment has not been a condition of employment.

13. On June 27, 1978, Mr. Mior wrote Mr. A. K. Fisher the following letter:

WITHOUT PREJUDICE

In regards to your letter of June 21st, 1978, wherein you state in part – "Other Understandings Reached" "section IV, Wage Schedule item piecework operations with employee owned equipment in our Camp M-404 operation", – we are at a loss to locate such a so listed item in the Agreement.

We conclude, however, that your letter was intended to advise that it was your intent, consistent with the item you stated, to commence piecework operations with employee owned equipment at Camp 404, on June 26th, 1978.

This will confirm the Union's position, as stated on May 17th, 1978, on this matter, that should you undertake to institute the foregoing

conditions, the Company will be in violation of the Agreement and understandings thereto.

Further be advised, that the notice (letter of June 21st, 1978), is in itself, a violation of the aforesaid Agreement and the understandings thereto, and is provoking great unrest in the ranks of your employees on your woods operations.

It is therefore, incumbent upon the Company to cease and desist, as failure to do so, will leave the Union no recourse but to take the necessary steps to enforce the Agreement as provided thereby.

14. There is no doubt that Mr. Mior, Mr. Lorenowich and some members of Local 2693 were strongly opposed to the applicant's encouragement of its employees to become pieceworkers. Mr. Lorenowich in particular was prominent in explaining what he saw as the perils of piecework to the applicant's employees. All of the applicant's employees who had shown any interest in becoming pieceworkers abandoned such interest with the exception of Larry Andrushuk. Despite considerable pressure from Mr. Lorenowich, Mr. Mior and many of the applicant's employees, Mr. Andrushuk chose to become a pieceworker on the applicant's terms.

15. As soon as it was known by the respondents that Mr. Andrushuk was about to commence work as a pieceworker, the applicant maintained the position as set forth in its correspondence and Local 2693 stood by the views which were expressed in the letters which originated with Mr. Mior. The parties were on a collision course. On July 5, 1978, the employees on the regular day shift refused to commence work in the applicant's woodlands operations at Camp M404. These employees were joined by employees on the evening shift. On July 6, 1978, the employees on the regular day shift refused to commence work in the applicant's woodlands operations at Camp M405. These employees were joined by employees on the day shift and the evening shift at the applicant's Central Garage and by employees who were engaged at the applicant's Central Haulage operations. These employees refused to commence work or to return to work until the applicant discontinued the introduction of its proposed piecework operations and until Larry Andrushuk discontinued working as a pieceworker. Certain conduct occurred on July 5, 1978, which led to the discharge of the respondents G. Aveyard, L. LaBelle and B. Penney.

16. Having regard to the evidence before it, the Board finds that the respondents; other than Local 2693, Tulio Mior, John Lorenowich and Raymond Loveday; commencing on either July 5 or July 6, 1978, refused to work or to continue to work in combination or in concert or in accordance with a common understanding and thereby engaged in a strike within the meaning of section 1(1)(m) of The Labour Relations Act. Work was scheduled for these employees to perform and the Board finds no substance to the respondent's allegation that the applicant's employees were locked out by either William McKinnon, the applicant's industrial relations manager for woodlands operations, or any other representative of the applicant. This allegation was largely based upon conversations between Mr. McKinnon and the employees on a bus on July 5, 1978. Mr. McKinnon's remarks were taken out of context and were unfairly characterized as a threat of a lockout. The strike occurred during the term of the collective agreement referred to in paragraph three. Having regard to the provisions of section 63(1) of The Labour Relations Act, the Board finds that

the strike is an unlawful strike within the meaning of section 82 of The Labour Relations Act.

17. It was the applicant's position that Local 2693 called or authorized the unlawful strike and that Messrs. Mior and Lorenowich counselled, procured, supported or encouraged the unlawful strike. In his letters dated May 24 and June 27, 1978, Mr. Mior set forth his concerns about the introduction of piecework operations and expressed strong opposition to the applicant's proposals in this regard. However, there is no evidence that Mr. Mior advocated any unlawful conduct either in his letters or in his conversations to the applicant's employees. His forceful advocacy of the position of Local 2693 ought not to be confused with advocacy of unlawful conduct. Similarly, Mr. Lorenowich, while adopting strong opposition to the introduction of piecework operations warned the applicant's employees that the strike was unlawful and told them that they should return to work. Mr. Lorenowich in consultation with the applicant's management endeavoured to have the employees return to work. The evidence before the Board does not go so far as to establish that Local 2693 called or authorized the unlawful strike or that Messrs. Mior and Lorenowich counselled, procured, supported or encouraged the unlawful strike.

18. The unlawful strike occurred because the applicant and Local 2693 each have quite different views on the interpretation of various provisions of their collective agreement. As in the *Canadian Elevator Manufacturers* case, [1975] OLRB Rep. Nov. 878, the parties to the collective agreement have not filed a grievance in an attempt to resolve their differences under the collective agreement. However, unlike the factual situation in the *Canadian Elevator Manufacturers* case, *supra*, the Board is of the opinion that this application is not merely a strategic device designed to reinforce a self-help posture. Both parties to the collective agreement are able to erect fairly plausible arguments in support of their interpretation of the provisions which are in dispute. The applicant has instituted a new pieceworker into its woodlands operation. It is open to Local 2693 to have recourse to the grievance procedure under the collective agreement, or to commence proceedings under The Labour Relations Act. In view of the position of Mr. Mior that the applicant is in flagrant violation of the collective agreement it is surprising that Local 2693 has not filed a grievance under the collective agreement. At this point in time it may not be said that the applicant has violated the collective agreement. On the other hand, while it may not be said that Local 2693 has violated the collective agreement, it is manifestly true that the respondents other than Local 2693, Tulio Mior, John Lorenowich and Raymond Loveday have engaged in an unlawful strike. The proper course for such respondents was not to engage in an unlawful strike but to have their bargaining agent dispute the applicant's interpretation of the collective agreement by means of the grievance and arbitration procedure.

19. The conduct of the applicant in the instant application was not of a facetious or provocative nature as was the conduct by the representatives of the employer in the *Pigott Construction Limited* case, [1976] OLRB Rep. April 160. The applicant's interpretation of the provisions of the collective agreement, while it may or may not be correct, is not unreasonable. The introduction of piecework on an optional basis is in no sense provocative behaviour and requires a response from the respondents which is lawful under the laws of Ontario. Methods other than self help for resolving the conflict are available. Such lawful methods ought to be used. The Board finds no reason to provide for a review of the direction which has issued in this matter. Throughout the testimony, the respondents expressed dissatisfaction with the slowness of the arbitration procedures under the collective agree-

ment. In the Board's view a prompt decision by an arbitrator on the meaning of the provisions of the collective agreement which are in dispute would do much to clear the air between the parties. The respondents argued that the Board ought to order the reinstatement of the three employees who were discharged. In the exercise of its discretion under section 82 of the Act, the Board is not prepared on the evidence before it to order the reinstatement of these three employees.

20. For the foregoing reasons the Board made the decision in this matter dated July 12, 1978.

0139-78-R Labourers' International Union of North America, Local 506, (Applicant), v. **P & R Concrete Finishing**, (Respondent), v. The General Contractors' Section of the Toronto Construction Association, (Intervener # 1), v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener # 2).

Certification – Practice and Procedure – Prehearing Vote – Employees eligible to vote are those employed on terminal date

BEFORE: N.B. Satterfield, Vice-Chairman, and Board Members H.J. Ade and E. Boyer.

DECISION OF THE BOARD: July 31, 1978

1. The Board, by its decision dated May 8, 1978, directed that a pre-hearing representation vote be taken. The vote was held as directed on May 27, 1978. Immediately following the taking of the vote, the scrutineer for the applicant challenged the Voters' List, alleging to the Returning Officer that there were additional employees who were eligible to vote. Subsequently, by letter from its counsel dated June 5, 1978, the applicant asked the Board to inquire into the eligibility to vote of six employees whose names were not included on the Voters' List which had been agreed to by the parties. The applicant further requested that should the Board find that these employees should have been on the list, a new vote be directed by the Board. None of the six employees in question presented themselves to the Returning Officer at the vote seeking to cast a ballot.

2. The Board appointed an Examiner to inquire into the respondent's payroll and personnel records and having done so, he reviewed his findings with the parties. His examination revealed that five of the six employees did not work for the respondent on the terminal date. Four of the five employees also had not worked both on the day preceding and the day following the terminal date. The fifth one, who had worked the day preceding the terminal date, did not work the day following it. The sixth employee, Franco Scaccia, was at work for the employer on the terminal date within the voting constituency defined in the Board's decision dated May 8, 1978.

3. The Board's practice in respect to determining the eligibility of voters in pre-hear-

ing representation votes is set out in its Practice Note No. 9 and reads, in part, as follows: "... it has been the practice of the Board, except in special circumstances, to direct that the employees in the voting constituency who are eligible to vote are those *in the employ of the employer on the terminal date* fixed for the application ..." (emphasis added). For the construction industry, "... in the employ of the employer ..." has been applied to mean to be at work for the employer in the voting constituency on the terminal date. The Board is satisfied from the facts before it that of the six employees in question only Mr. Scaccia was eligible to vote.

4. The Board recognizes that there may be, from time to time, circumstances in which employees who may be eligible to vote are missed from the Voters' List. Therefore, when the Board directs that representation votes be held, part of its procedure is to post at the employer's work place a Notice of Taking a Vote by the Ontario Labour Relations Board (Form 42). This Notice contains a direction to employees who may be in doubt about their eligibility to vote to inquire of the Returning Officer at the vote. In addition, the copy of the Voters' List which is posted with the Notice contains the following advice:

Any employee whose name does not appear on the Voters' List or challenged voter who feels that he or she is entitled to vote should take this matter up with the Returning Officer during the taking of the vote.

The Notice and Voters' List posted in this instance contained these directions and they were posted at least one week prior to the holding of the vote.

5. Having regard to all of the foregoing facts and circumstances and taking into account also that there is no allegation that Mr. Scaccia was misled by the absence of his name from the Voters' List, the Board finds that there are no grounds for directing that a new vote be taken.

6. The applicant's request to be allowed to challenge the Voters' List after the vote was taken was founded on its claim that the identity of the employees in the employ of the respondent as of the terminal date was exclusively within the knowledge of the respondent; that the applicant relied upon the information supplied by the respondent in this regard at the pre-hearing meeting with the Examiner; and that it subsequently obtained knowledge as to the existence of other persons in the employ of the respondent on the terminal date. The applicant also requested a hearing for the purpose of leading evidence in respect to the Voters' List and making representations thereon should the respondent's records not indicate that these six employees, or any others, were in its employ on the relevant dates. The Board notes in this regard that the applicant agreed to the Voters' List at the pre-hearing meeting on May 4, 1978. The vote was held on May 27, 1978. There was ample time between the meeting and the vote for the applicant to make enquiries about voting eligibility of employees whom it claims to represent. It appears in this instance that the applicant did not do so.

7. Having regard for all of the circumstance related above, the Board is of the view that such a hearing would not add usefully to the facts already before it and would serve only to delay further the counting of the ballots, and consequently the knowledge by the respondent and its employees as to which trade union will represent them in their relationships with their employer. Such further delay can only be harmful to effective labour relations.

8. Therefore, the Board denies the applicant's request for a hearing and directs the Registrar to cause the ballots cast in the pre-hearing representation vote to be counted and report to the Board.

0447-78-U; 0496-78-U Canadian Union of Public Employees,
(Complainant), v. **Scarborough Centenary Hospital Association**, (Respondent).

S-79 – Withdrawal of parking privileges held to be breach of the statutory freeze imposed following notice to bargain

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J. D. Bell and A. Hershkovitz.

APPEARANCES: *T. Edwards, Ray Tilley and Tom Dimbler for the complainant, Canadian Union of Public Employees; Beth Symes and Mary Hodder for the complainant, Ontario Nurses' Association; Murray Levis for the respondent.*

DECISION OF THE BOARD: July 18, 1978

1. The name: "Scarborough Centenary Hospital" appearing in the style of cause of these complaints as the name of the respondent is amended to read: "Scarborough Centenary Hospital Association".

2. The Board directs that the above complaints be and the same are hereby consolidated.

3. The complainant unions have filed complaints under section 79 of The Labour Relations Act alleging that the named grievors have been dealt with by the respondent contrary to the provisions of section 70(1) of the Act as modified by section 10 of *The Hospital Labour Disputes Arbitration Act* R.S.O. 1970, c.208 as amended (H.L.D.A. Act) which reads as follows:

Notwithstanding subsection 1 of section 70 of *The Labour Relations Act*, where notice has been given under section 13 or 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and, no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

The freeze that is applicable to hospitals falling under the provisions of the H.L.D.A. Act extends, where no collective agreement is in operation, from the time notice is given under sections 45 or 13 of The Labour Relations Act until either the right of the trade union to represent the employees has been terminated or a new collective agreement between the parties is set in place. We note that the freeze under the H.L.D.A. Act where the resort to strikes and lock-outs is replaced by binding arbitration may run for a considerably longer period of time than a typical freeze under section 70(1) of The Labour Relations Act which may be terminated after the expiration of certain time limits following the appointment of a conciliation officer.

4. In the instant case the Ontario Nurses' Association (O.N.A.) gave notice to bargain on July 5, 1976. The outstanding matters in dispute were heard before an arbitrator appointed under the provisions of the H.L.D.A. Act on May 19, 1978 and the parties are awaiting his award. In the case of the Canadian Union of Public Employees (C.U.P.E.), Local 1320, notice to bargain was given on March 31, 1978 and the parties are presently negotiating for the renewal of their expired collective agreement.

5. The parties agree that ever since the Scarborough Centenary Hospital opened in 1967, the employer has provided free parking for the employees. The parties further agree that free parking has been a privilege extended by the employer to the employees and is not encompassed by either of the two collective agreements that were in effect between the parties prior to the onset of the freeze period. Ms. Carol Laverne who has been a member of the O.N.A. negotiating team since 1974 testified that during a previous set of negotiations the employer indicated that he anticipated there would be no change in the free parking arrangements.

6. After the onset of the freeze periods for both complainants, however, the employer posted a notice to all its employees dated May 4, 1978 stating that a charge of five dollars per month in the form of a payroll deduction or fifty cents per day would be charged for parking as of June 1st and that a five dollar deposit for the magnetic cards required to activate the parking gate would be charged as well. The evidence shows that payroll deductions for both the parking and the deposit for the magnetic cards were made commencing with the pay period ending June 18, 1978. The evidence further shows that at no time prior to the institution of the change did the employer seek the consent of either of the complainant unions. He simply informed them in May that the change was going to take place in June.

7. In view of the fact that the matter of parking was placed before the interest arbitrator by the O.N.A., the employer asked the Board to exercise its discretion to decline to hear this matter with respect to the O.N.A. until his award comes down. The Board of Arbitration established under the H.L.D.A. Act, however, will be setting the terms of the new collective agreement rather than determining whether or not there has been a violation of the freeze period. The Board, therefore, is of the view that it would be an improper exercise of its discretion to decline to forthwith resolve the section 70(1) complaint placed before it by the O.N.A.

8. The Board has consistently stated that the purpose of the freeze period imposed by section 70(1) (as modified by section 10 of the H.L.D.A. Act in this instance) following the giving of notice to bargain is to maintain the status quo of the employment relationship

so that the union is given an opportunity to enter negotiations and bargain for a collective agreement from a fixed point of departure and in an atmosphere of industrial relations security that is undisturbed by alterations in conditions of employment (see *Carleton University*, [1978] OLRB Rep. Feb. 184 and the cases cited therein). Because the Board has recognized that the four-corners of the collective agreement may not encompass all of the conditions of the working relationship, the Board has interpreted the scope of the freeze under section 70(1) as extending to the full relationship and not merely to the terms and conditions of employment as set out in the collective agreement. Accordingly, the Board in *The Hydro Electric Commission of the City of Mississauga*, [1977] OLRB Rep. Dec. 821 found that the employer had violated the freeze period by revoking a privilege it had extended to the employees relating to the use of commissioned vehicles during weekends even though the use of the vehicles was not covered in the collective agreement and even though the privilege was something which could properly have been withdrawn by the commission outside the freeze period or during the course of the collective agreement. As the Board more recently stated at p. 7 in *A. N. Shaw Restoration Ltd.*, File No. 0242-78-U, dated June 19, 1978, as yet unreported, if the Board were to find that under a broadly worded management rights clause the management, during the freeze period, had the right to revoke privileges which had been extended prior to the freeze period, the Board would be,

hard pressed to think of any privilege extended by management which could not be revoked ... In these circumstances, any number of benefits not established by formal agreement, including in many cases wash-up time, coffee breaks, early leaving or as in the *Hydro* case, use of company vehicles, would be subject to withdrawal during the freeze period on the basis of a decision to insist on the exercise of express rights. The better view, having regard to the wording and purpose of the section, is that ... a privilege ... if not withdrawn prior to the commencement of the freeze, forms a part of the status quo which is maintained throughout the freeze.

9. In other words, the Board has found that in order to protect the purpose of section 70, a party who wishes to revoke a privilege which may reasonably be expected to continue or re-assert a right which has been consistently waived must do so or communicate its intention to do so prior to the commencement of the freeze period so that minimal disruptions to the employment relationship will arise to interfere with the ongoing negotiations.

10. In the instant case the privilege of free parking, which the employer had extended to the employees for more than a decade and which the employees had every reason to anticipate would continue in the future, was unilaterally revoked during the freeze period without the consent of the trade union. Because the employer neither exercised its right to revoke the privilege outside the freeze period nor communicated its intention to do so prior to the freeze period, the Board finds that the respondent has violated the provisions of section 70(1) of The Labour Relations Act, as modified by section 10 of the H.L.D.A. Act. Accordingly, the Board orders that the hospital forthwith reinstitute the privilege of free parking for employees and reimburse all employees for charges made for parking in violation of the freeze period.

1904-77-R Canadian Union of Public Employees, (Applicant), v Toronto Auto Parks (Airport) Limited,(Respondent), Group of Employees,(Objectors).

Certification – Constitutional Law – Employer operating parking lot on airport grounds – Employment relations found to be within provincial jurisdiction

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members C.G. Bourne and W.F. Rutherford.

APPEARANCES: *Helen Browne for the applicant; E.L. Stringer, Q.C., C. Humphrey, A. Brown, A. Black and D. Starkman for the respondent; James L. Parkinson, Bill Bradley and Jorge Gonzalez for the objectors.*

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER W.F. RUTHERFORD, July 31, 1978.

1. This is an application for certification.
2. At an initial hearing into this matter counsel for the respondent contended that legislative jurisdiction with respect to the labour relations of the employees affected by the application rested with the Federal Parliament, and that therefore this Board lacked jurisdiction to entertain the application. In a brief decision dated May 11, 1978 the Board concluded that it did, in fact, have jurisdiction to entertain the application. It is to be noted that Board Member C. G. Bourne is now of the view that the Board does not have jurisdiction. What follows are our reasons for concluding that the Board does have jurisdiction as well as our disposition of the application on its merits.
3. The respondent is under contract with the Crown in right of Canada (hereinafter referred to simply as "the Federal Government") to manage certain public parking facilities owned by the Government at the Toronto International Airport. Under the terms of the contract the respondent is responsible for the operation of the parking facilities, for collecting parking fees from users of the parking facilities and for keeping the parking areas and cashier booths clean. Under the terms of the same contract the respondent operates a luggage cart retrieval service. Certain self-service luggage carts are provided within Terminal 2 at the airport for the use of airline passengers in moving their luggage through the terminal complex. The respondent's employees are responsible for retrieving the luggage carts from wherever they are left, both within and outside of the terminal, and repositioning them so as to again be available to the travelling public. The same contract also makes reference to the respondent providing a shuttle service between Terminal 2 and certain outdoor parking areas. No mention of such a service was made at the hearing, however, and it would appear that in fact such a service is not currently being provided by the respondent.
4. Two grounds were advanced by Counsel for the respondent in support of his proposition that the respondent's employees fall under federal jurisdiction. Firstly, it was contended that the operation of airports falls exclusively within federal legislative competence and that the services provided by the respondent are an integral part of the operation of the Toronto International Airport. Secondly, it was argued that the respondent in reality is not carrying on its own business but rather is carrying on the business of the Federal Government, and that therefore it cannot be affected by provincial labour relations law. We

propose to deal with these two grounds separately, starting first with the contention that services provided by the respondent fall within federal legislative competence over the operation of airports.

5. It is now settled law that the regulation of labour relations generally falls within provincial legislative competence as being an aspect of "property and civil rights in the Province", a matter which by section 92 of the *British North America Act* is exclusively reserved to the provincial legislatures. See: *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. However, it is also now beyond dispute that the Federal Parliament does have legislative authority over the labour relations of those enterprises which are within Parliament's exclusive competence. See: *Reference re Eastern Canada Stevedoring Co. Ltd.* [1955] S.C.R. 529.

6. One matter which should be disposed of before going any further, is any suggestion that because the Toronto International Airport is situated on land owned by the Federal Government the labour relations of persons employed on the airport must fall within federal jurisdiction. Section 91(1A) of the B.N.A. Act does give to the Federal Parliament legislative authority with respect to "the public debt and property". However, the scope to be given to Parliament's authority under this heading is aptly outlined by Professor Dale Gibson in his article entitled *The 'Federal Enclave' Fallacy in Canadian Constitutional Law*. (1976) 14 Alta. L.R. 167. Certain excerpts from that article follow:

"The Crown in the right of Canada owns many different types of real property within the boundaries of every province: Indian reserves, national parks, federal penitentiaries and hospitals, public harbours, airports, federal office buildings, certain roads and canals, and so on. The notion that each of these is a federal "enclave" offering sanctuary from the general laws of the province, is novel. If it were adopted by the courts, it would, extend the limits of interjurisdictional immunity well beyond its present bounds. It would mean, presumably, that in the absence of federal legislation incorporating provincial law by reference, provincial legislation would not affect commercial transactions carried out on public wharves or wills made by prisoners of federal penitentiaries or automobile accidents occurring in national parks.

...

The British North America Act gives the Parliament of Canada exclusive legislative jurisdiction over federal Crown property. Some have construed this provision to mean that it is only federal laws which may operate within the geographic limits of such property. This is not the case, however. This section merely means that the Parliament of Canada may exclusively make *property laws* with respect to such property. There is nothing to prevent general provincial statutes which do not essentially affect the *proprietary rights* of the federal Crown from being extended to federal lands. The cases concerning immunity of federal property from provincial statutes, which will be reviewed in the following paragraphs, contain no suggestion of immunity in other than proprietary matters.

There can be no doubt that provincial laws may not derogate from the property rights of the federal Crown or its agents unless there has been submission or incorporation by reference. The province has no power to grant federally-owned land to others, or to subject federal land to legislation such as the Mechanics Lien Act, which imposes the risk of loss of title, or even to prevent the federal Crown from acquiring lands that would otherwise pass to it by altering the laws of escheat. It is probable that the federal Crown would not be obliged to comply with provincial laws concerning conveyancing or registration of title or imposing other duties on landowners.

...

Apart from "property" laws, therefore, it seems very clear from the cases that provincial laws of general application operate within federal property in the province. A soldier, hunting for his private purposes on a federal military base in Ontario, has been held to be subject to provincial laws. *R v. Smith* [1942] 3 D.L.R. 764 (Ont. C.A.). Provincial liquor laws apply to the private activities of individuals on federal government wharves *Cote v. Quebec Liquor Commission* [1931] 4 D.L.R. 137 (Que. K.B.). The provincial legislature may legislate to control privately created nuisances within federally-owned public harbours, or other federal property *Re Vancouver Charter* (1957) 24 W.W.R. 323 (B.C.S.C.).

Provincial authorities may issue business licences *R v. Karchaba* (1965) 52 D.L.R. (2d) 438 (B.C.C.A.) or grant a ferry monopoly *Toronto Transit Commission v. Aqua Taxi Ltd.* (1957) 6 D.L.R. (2d) 721 (Ont. S.C.) with respect to federal harbours. Although most of these pronouncements are from provincial courts, their cumulative effect is sufficient to negate the possibility of federal 'enclaves'."

7. It should be noted that a majority of the Supreme Court of Canada specifically rejected the enclave concept insofar as Indian reserves are concerned in *Cardinal v. A.G. of Alberta* (1974) 40 D.L.R. (3d) 553. More recently the Court by implication unanimously rejected the concept with respect to national parks in *Canada Labour Relations Board v. C.N.R.* (1974) 45 D.L.R. (3d) 1. In that case it was held that federal labour law does not apply to the employees of a resort hotel owned by a publicly owned federal railway company which is carrying on business within Jasper National Park.

8. Although the respondent's operations are not exempted from provincial labour relations law simply because they are carried out on federal property, nevertheless they would be so exempted if for some other reason they fall within federal legislative authority. To determine whether or not this is the case reference must be had to the scope of the federal authority in this area.

9. In *Re Regulation and Control of Aeronautics* [1932] 1 D.L.R. 58 the Judicial Committee of the Privy Council ruled upon the validity of certain federal legislation designed to implement obligations imposed by a 1919 aeronautics convention between the British Empire and several foreign countries. The legislation was upheld on the basis of section 132 of the B.N.A. Act, which provides as follows:

“The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.”

Although Lord Sankey in giving the decision of the Judicial Committee clearly based his decision on section 132 of the B.N.A. Act, he also indicated that the Federal Government might be able to legislate with respect to aerial navigation on the basis of its general power under section 91 of the Act to make laws for the “Peace, Order and good Government of Canada.”

10. In 1947 the federal government “denounced” the international convention which had been considered in the *Aeronautics* case and entered into a new aeronautics convention in its own right. As a result of this action federal authority over aeronautics could no longer be based on section 132 of the B.N.A. Act. The question as to where legislative authority over aeronautics now lay was considered by the Supreme Court of Canada in *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292. The decision of the Supreme Court in this case left no doubt that continued federal jurisdiction over aeronautics was firmly rooted in Parliament’s authority to pass laws for the peace order and good government of Canada. Such a conclusion appears to have been based primarily on the proposition that aeronautics satisfies the test expounded in *AG – Ont. v. Canada Temperance Federation* [1946] – A.C. 193, namely that “it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole.”

11. The result of the *Johannesson* case was to put beyond challenge the authority of the Federal Government to legislate with respect to aeronautics. The result of this case and the *Stevedoring* case when taken together is that this Board, being as it is a creature of the Ontario Legislature, can have no jurisdiction with respect to the labour relations of employees engaged in aeronautics. The question then is at what point does federal jurisdiction end.

12. The manner in which one is to determine the dividing line between federal and provincial jurisdiction has been expressed in a number of ways. A good review of the terminology employed is contained in the following excerpt from the judgement of Donohue J. in *Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board* [1967] 2 O.R. 25 at 30-31 (Ont.H.C.), decision aff’d on different grounds at [1967] 2 O.R.243 (C.A.):

“Applicants counsel cited the following case in support of this proposition: *Reference re Eastern Canada Stevedoring Co. Ltd.* [1955] S.C.R. 529 ...direct(ing) attention to the reasons for judgment of Rand, J., at pp. 548-9... There the learned jurist states that the tests of the scope of Dominion powers as they touch incidentally upon civil rights are difficult of precise formulation. He points out that in a number of Privy Council cases the enquiry has been whether a certain civil right was “truly ancillary” to Dominion legislation (railways) or “necessarily incidental” in another case and “incidentally” in another.

And he states further that:

'These phrases assume that legislation on a principle subject matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that *if the subordinate matter is reasonably required for the purposes of the principle or to prevent embarrassment to the legislation*, its inclusion to that extent is legislative. This may be no more than saying that *the incidental has a special aspect related to the principle*. Actual necessity need not appear as the contracting out case shows; *it is the appropriateness, on a balance of interests and convenience, to the main subject matter or the legislation*'."

(Emphasis added)

13. From these comments it appears clear that for provincial jurisdiction over labour relations to be excluded the operation in issue must be an integral part of, or necessarily incidental to, some subject matter coming within federal jurisdiction, in this case federal jurisdiction over aeronautics. In approaching the question of whether the operation of parking facilities and the running of a luggage cart retrieval service are an integral part of, or necessarily incidental to, aviation, some assistance can be gained by looking at those activities which have been held to be covered by federal authority over aviation and those where provincial law has been held to be applicable.

14. There appears not to have been any serious challenge to the generally accepted view that federal labour relations legislation governs the employ of air crew. In *Re Field Aviation Co. Ltd. and International Association of Machinists & Aerospace Workers Local Lodge 1579* (1974) 45 D.L.R. (3d) 751 (Alta Sup.Ct.) it was held that federal jurisdiction also extended to those employees who actually service and inspect aircraft and certify them as being airworthy. A similar conclusion was reached by the Federal Court of Appeal in *Butler Aviation of Canada v. International Association of Machinists and Aerospace Workers* 76 CLLC Para. 14, 008 with respect to employees of a company engaged in the re-fuelling, maintenance and ground handling of private, corporate and commercial aircraft. This case involved an earlier decision of the Canada Labour Relations Board wherein that Board assumed jurisdiction in the matter. See *Butler Aviation of Canada Limited* 75 CLLC Para. 16, 156. Although the decisions of both the Canada Board and the Federal Court of Appeal focused primarily on the company's aircraft refuelling and maintenance operations, pilots or owners of the aircraft involved could also engage the company's services in baggage handling and its passenger lounge facilities. The lounge facilities were described as being for "the convenience of arriving and departing passengers." The exact nature of the "baggage handling" was not explained in detail in either the Court or Board decision, although Hyde, D.J. in giving the decision of the Federal Court of Appeal described it as seeming to be "more than portage." He also stated "There is no suggestion that its employees assisting passengers with their baggage are porters privately hired by those passengers, but just the opposite is implied by Mr. Green's use of the term 'baggage handling'." The impression one gathers from these comments is that the company's employees were actively engaged in the loading and unloading of baggage into the aircraft, rather than merely assisting passengers into the airport facilities with their luggage.

15. The Colonial Coach Lines case already referred to, involved a company engaged in the operation of a limousine service to and from the Toronto International Airport. The question before the Court was whether the Ontario Transport Board had jurisdiction to regulate the company's operations. It was the contention of certain of the parties in that case that because the company's business consisted of carrying airline passengers and aircrew to and from the airport, the company's business came exclusively within federal jurisdiction. In rejecting this contention Donohue J. made the following comments at 31-32:

Applying that part of the statements of Rand, J., (in the Stevedoring case) where he speaks of the subordinate matter being reasonably required for the purposes of the principal, I query whether the operation carried on by Air Terminal Transport Ltd. is a reasonably required one for the purposes of operating Toronto Airport. It seems clear to me at once that the transport of airline passengers and airline crew to and from Toronto Airport by Air Transport Ltd. is not reasonably required by Toronto Airport. Air Terminal Transport Ltd.'s service is no doubt a convenience to the public in going to and from the airport but it is without doubt the case that the airport could continue to function without the service of Air Terminal Transport Ltd.

It is to be noted that the Toronto Airport does not operate aircraft. It provides a harbour for aircraft and facilities for the travelling public. If there is any duty upon anyone other than the travellers themselves to get to and from the airport, such duty would surely fall upon the airlines who provide the planes for the passengers.

It is a fact of course, that the Government of Canada has entered into a lease with Air Terminal Transport Ltd. to provide service to and from and in the airport but this is for the convenience of the airlines and their passengers. Such a service may be reasonably required by the said airlines and their passengers but it is not reasonably required by the airport. One might fairly say that Air Terminal Transport Ltd.'s service furnishes both a primary, a secondary and a tertiary benefit. The primary benefit is to the passengers, the secondary benefit is to the airlines and the tertiary benefit is to the airport in the sense that it makes their operation somewhat more orderly than would be the case if the airport were jammed with private motor vehicles and taxis. I therefore conclude that the operation carried on by Air Terminal Transport is not reasonably required by the federal authority.

In the Stevedoring case dealt with by Rand, J., the stevedoring employees whose work was held to come under federal jurisdiction by reason of its relation to shipping, a federal subject, the connection of the stevedores with the ships was a different and closer kind of connection than that which exists between Air Terminal Transport Ltd. and the operation of Toronto Airport. In a manner of speaking the stevedores were dockside crew in port on the ships or the dock for loading and unloading. On the other hand, Air Terminal Transport Ltd.'s employees had no actual connection with the aircraft at Toronto Airport. They simply

transported airline passengers and airline crew and no doubt other persons such as restaurant personnel to and from the Toronto Airport. Does this then make Air Terminal Transport Ltd.'s operation part of aeronautics? I do not think so. Whereas in the Stevedoring case the loading, stowage and unloading of cargo is in a very real sense a critical part of the marine trade and practice, the mere transportation of passengers and crew to and from Toronto Airport is not ancillary to or incidental to aeronautics. There are things celestial and there are things terrestrial. Aeronautics may be celestial - bus and limousine transportation is terrestrial; and I do not think that the fact that Air Terminal Transport Ltd. holds a lease from the Government of Canada to operate on Toronto Airport enlarges Air Terminal Transport Ltd.'s real function. This lease gives the lessor a measure of control over Air Terminal Transport's operations but it does not make Air Terminal Transport an integral part of the operation of Toronto Airport.

16. In *Murray Hill Limousine Service V. Batson* [1965] B. R. 778 the Quebec Court of Queen's Bench, Appeal side, held that a ground transport franchisee at Montreal's Dorval Airport fell under The Quebec Minimum Wage Act with respect to porters who were employed to carry luggage from buses and taxis into the airport's interior. In reaching this conclusion the Court rejected an argument that the functions of these employees brought them within the federal aeronautics jurisdiction. The decisions of both Taschereau J. and Montgomery J. are particularly interesting. (Rinfret J. dissented while Choquette J. in deciding in favour of provincial jurisdiction did not set out his reasons for so doing). Taschereau J. referred to the decision of Lord Reid when giving the ruling of the Judicial Committee in *Canadian Pacific Railway Company v. A. -G. for British Columbia* [1950] A.C. 122 ("The Empress Hotel case"). In that case it was held that the British Columbia Hours of Work Act was binding upon a hotel owned by the C.P.R. since although the hotel might be of benefit to the company's railway business (which came within Federal jurisdiction) nevertheless it was not an integral part of its railway operations. After reviewing this case, Taschereau J. then held: [p. 785, translation from the original French used by Donohue J. in the Colonial Coach Lines case, p. 34]:

"That the work of the defendant's employees [the porters] as useful as it may be to the airlines and to their passengers does not form an integral part of aerial transport no more than do the restaurants, newsstands, beauty salons and bars established in all large airports for the comfort and benefit of travellers."

Mr. Justice Montgomery discussed the connection between the porters and aeronautics at some length in the following terms at 785 and 786:

The only question that gives me any difficulty is whether the work that was performed by plaintiffs related sufficiently closely to aeronautics to bring them outside the scope of the labour legislation of this Province and, particularly, the Minimum Wage Act. It seems to be conceded that the men who actually load and unload travellers' baggage in the aircraft are performing work outside provincial jurisdiction, their position being analogous to that of the stevedores considered by the Su-

preme Court in *The reference concerning the validity and applicability of the Industrial Relations and Disputes Investigation Act*. On the other hand, it seems to be conceded that defendant's employees who drive buses and taxis between the airport and the city are subject to provincial legislation. The porters such as plaintiffs form a connecting link between these two groups of employees, and it is a matter of some difficulty to determine on which side of the line their work falls.

Plaintiffs were not employed by the airlines but by defendant, the principal business of which is the operation of buses and taxis. In the course of their duties they had no direct contact with aircraft. Their services were not provided for the passengers by the airlines as one of the services incidental to the purchase of a ticket, but the passenger engaged these services at his own discretion, he being free if he wished to carry his baggage himself or have it carried by a friend. I do not regard any of these factors as being in themselves conclusive, but taken together they satisfy me that plaintiffs' work did not relate to aeronautics sufficiently closely to bring them outside provincial jurisdiction.

17. In considering these cases, it would appear that federal jurisdiction over aeronautics applies to aircrew, persons who service and refuel aircraft, and to those who load luggage on to airplanes, but that provincial legislation applies to employees engaged in transporting passengers and aircrew to and from the airport terminal and to porters who carry luggage into the airport terminal. We are satisfied that the services provided by the respondent's employees in this case are similar in nature to the type of activity referred to in the *Colonial Coach Lines* and *Murray Hill* cases, such that while they provide a convenience to the travelling public, they are not sufficiently integral to aeronautics to bring them within federal legislative jurisdiction.

18. As a final word on this matter we would note that our conclusion in this regard appears to be supported by the basic reasoning underlying what are perhaps the two leading authorities on the question of the scope of federal legislative authority over labour relations, namely the decision of the Supreme Court of Canada in the *Stevedoring* case and the decision of the Judicial Committee of the Privy Council in the *Empress Hotel* case. In the *Stevedoring* case it was held that *Stevedoring* work fell within the scope of federal jurisdiction over navigation and shipping, while in the *Empress Hotel* case the operation of a hotel was held not to come within Parliament's jurisdiction to legislate with respect to an inter-provincial railway. The decision in the *Empress Hotel* case was based on the conclusion that while the operation of the hotel was of assistance to the C.P.R.'s railway business, nevertheless it was in fact a separate undertaking. However, as noted by Donohue J. in the *Colonial Coach Lines* case, the *Stevedoring* case involved the "loading, stowage and unloading of cargo (which) is in a very real sense a critical part of the marine trade and practice." The distinction between these two cases, simply put, is that while a navigation service cannot function without the services of stevedores, a railway can function without hotel staff. Similarly with respect to aviation, while an aviation service requires the services of the people who fly, load and service the airplanes, it can be provided without the services of those who drive limousines to the airport, carry luggage into the terminals and run restaurants and shops on the airport. Similarly, an aviation service can be provided without the services of employees who operate pay-parking facilities and retrieve self-service luggage carts.

19. The second basis of the respondent's claim that the Board lacks jurisdiction over its operations is that it is essentially carrying on the business of the federal government.

20. The contract with the Federal Government under which the respondent operates is a lengthy and detailed document. Certain of the major clauses in this agreement follow:

"1. The Company hereby agrees to manage and operate the said public car parking facilities of Her Majesty at the said airport and collect parking fees as may be established in writing from time to time by the Minister, from persons using the said public car parking facilities and further agrees to manage and operate a Luggage Cart Retrieval Service in Lessor's Terminal 2, (hereinafter referred to as "the said services").

2. That the Company shall, except as in this Agreement otherwise specifically provided, at its own cost and expense, provide all and every kind of labour, superintendence, services, equipment (other than the self-service luggage carts, and the equipment of Her Majesty as listed in Appendix "B" hereto annexed), materials, supplies, articles, and things necessary for the due and satisfactory performance by the Company of the said services and the Company shall commence on the First day of February, 1976 and thereafter shall diligently execute and perform the said service during the currency of this Agreement.

11. That the Company shall comply with and shall be subject to all terms, stipulations and conditions contained in the Labour Conditions annexed hereto as Appendix "A" and any amendments thereto provided by the Department of Labour from time to time and forwarded to the Company by Her Majesty by registered letter, such amendments shall be effective from date of receipt of such letter.

12. That the Company shall, at its own cost and expense, concurrently with the execution of this Agreement, place and shall at all times during the continuance of this Agreement maintain public liability and property damage insurance, in an amount not less than \$300,000.00 against personal injuries, death and loss or damage to property, and in addition, and in like manner, the Company shall maintain comprehensive garage liability insurance, in an amount not less than \$300,000.00 in respect of all risks arising out of the operation and use of any motor vehicles belonging to the public, with a responsible insurance company or companies and in such form as approved by the Minister, so as to fully cover the Company's liabilities to any firm, person, association or corporation, resulting from or attributable to the operation conducted by the Company in the said public car parking facilities under and pursuant to this Agreement, and evidence of such insurance satisfactory to the Minister shall be deposited in the Department of Transport.

13. That the Company shall, at its own cost and expense concurrently with the execution of this Agreement, also furnish to Her Majesty an Indemnity Bond in the amount of \$75,000.00 of a Surety or Guaranty

company satisfactory to the Minister in such form and terms as may be approved by the Minister, to secure the due and specific performance of the services, materials, matters and things required to be done, furnished and performed in connection with the collection of revenue derived from the management and operation of the said airport, and the Company shall have the said Bond renewed from year to year during the term of this agreement, and the said Bond and the renewals thereof shall be deposited in the Department of Transport.

16. a) That the Company shall assume full and sole responsibility for the Management and operation of the said public car parking facilities of Her Majesty at the said airport and for the collection of parking fees as may be established, in writing, from time to time by the Minister, from persons using the said public car parking facilities and the Company shall remit to Her Majesty in accordance with the provisions hereof the full amount of all such parking fees, whether actually paid or due and payable only, by users of the said public car parking facilities and notwithstanding any loss sustained by the Company with respect to the said fees, as a result of theft, defalcation or from any other cause whatsoever, and the Company hereby accepts and assumes all risks of collection and/or loss in respect thereof. **PROVIDED:** that the Company shall not be required to remit accrued parking charges on abandoned or unclaimed vehicles pursuant to Clause 10 herein.

21. That Her Majesty shall not be responsible for claims for personal injuries or for damages to or loss of any property belonging to the Company, its officers, agents and employees of whatsoever nature and howsoever caused or arising, unless such injuries or damage are due to the negligence of any officer or servant of Her Majesty the Queen in the right of Canada while acting within the scope of their duties or employment, and the Company shall indemnify and keep harmless Her Majesty from and against all such claims.

27. That the said service to be performed by the Company under the provisions of this Agreement shall, in every particular, be under and subject to the control and supervision of the Airport General Manager, and all orders, directions and instructions at any time given with respect thereto, or concerning the conduct thereof, shall by the Company promptly and efficiently be obeyed, performed and complied with, to the satisfaction of the Airport General Manager and in conformity with this Agreement.

29. That the Company shall engage suitable personnel to efficiently provide and maintain the required standard of services; that such personnel shall be properly groomed and attired; that local personnel shall be employed to the extent practical and consistent with reasonable efficiency and economy; and that should it be determined by the Airport General Manager at any time that there is a significant demand for bilingual service to the public in both official languages the Company

shall engage or train qualified personnel to fulfill the need for such level of bilingual services in both official languages as may be required, all as determined by and to the satisfaction of the Airport General Manager.

33. That, notwithstanding anything herein contained, in case default, breach or non-observance be made or suffered by the Company at any time or times, in, or in respect of any of the covenants, provisoes, conditions and reservations herein contained, which on the part of the Company ought to be observed or performed, then, and in every such case, provided that action is not taken forthwith by the Company, as established to the satisfaction of the Airport General Manager, whose decision shall be final, to cure such default, breach or non-observance, upon receipt of a notice thereof, in writing, from the Airport General Manager to the Company, Her Majesty may terminate this Agreement, at any time, by giving to the Company in writing, signed by or on behalf of the Minister and either delivered to the Company or any officer of the Company, or mailed addressed to the last known place of business or office of the Company, at any of Her Majesty's Post Offices, and, thereupon, upon delivery or mailing of such written notification, this Agreement shall be determined and ended, and the Company shall thereupon, and also in the event of the termination of this Agreement in any other manner, forthwith remove from the said public car parking facilities all supplies, articles, equipment, materials, effects and things at any time brought or placed thereon by the Company, and the Company shall also to the satisfaction of the Minister, repair all and every damage or injury occasioned to the lands and premises of Her Majesty by reason of such removal or in the performance thereof, but the Company shall not by reason of any action taken or things performed or required under this Clause, be entitled to any compensation whatsoever.

21. Much of the equipment used by the respondent is owned by the Federal government, although certain equipment and materials must be supplied by the respondent.

22. As indicated in clause 11 of the contract set out above, certain "Labour Conditions" are annexed to the contract. These will be touched upon in greater detail later in this decision.

23. Clause 22 of the contract provides that "in consideration of the premises and of the observance and performance by the company of all covenants, provisos, and conditions in this agreement" the government will pay to the respondent:

a) an amount "equal to the hourly wages as defined in the Federal Labour Conditions and specified in Appendix "A" thereto (as revised from time to time by the Department of Labour for those classifications of labour), paid by the company to employees of the company"

b) an amount equal to annual wages paid for managerial and administrative services, and

c) a management fee.

24. From the terms of the contract it would appear that the respondent has been retained by the Federal Government to operate and manage its parking facilities and to run a luggage cart retrieval service under some fairly tight terms, and that failure to adhere to those terms may result in the contract being terminated by the Government without any compensation being payable to the respondent.

25. One thing that is made clear by the contract is that the persons engaged in the work therein described are employees of the respondent and not of the Federal Government. Clause 2 of the contract states clearly that the respondent shall provide "all and every kind of labour." Clause 29, in turn, specifies that it is up to the respondent to "engage" or hire the personnel required. Presumably the respondent can also discharge an employee. We would also note that clauses 6, 16(e), 18 and 19 (which are not set out above) each uses the term "employees of the Company," "the Company's employees" or "the Company and its employees." Also of some interest is clause 21. This clause provides that the Federal Government will not be responsible for any personal injuries of the respondent's employees "unless such injuries are due to the negligence of any officer or servant of Her Majesty, The Queen in right of Canada while acting within the scope of their duties." It is also of some importance that while the contract provides that the Airport General Manager can give directions to the respondent at no point does the Federal Government retain the right to directly control the employees in the performance of their work, instead such control rests with the respondent. We are satisfied that the relationship in this case is of the same type as the second situation referred to in the following excerpt from *Canadian Northern Transfer Co. v. Toronto Storage Co.* (1924) 55 O.L.R. 352 (C.A.) per Latchford C.J. at 356:

"What I regard as an admirable statement of the law appears in the judgment of Mr. Justice Moody in delivering the opinion of the Supreme Court of the United States in *Standard Oil Co. v. Anderson* (1909) 212 U.S. 215. He says (P. 221) 'It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may thus enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through workmen of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for the negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of the work.' "

26. It is now a generally accepted proposition that it is legislative authority over an operation and not the employer involved which is determinative of jurisdiction over labour relations. Pigeon J. summarized the law in this regard as follows in *Canada Labour Relations Board v. City of Yellowknife* (1977) 76 D.L.R. (3d) 85 (S.C.C.) at 90.

“One has to bear in mind that it is well settled that jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer.”

In that the operation of the parking facilities and cart retrieval service come within provincial jurisdiction for the purposes of labour relations, it might be argued that even if federal civil servants were employed to do the work, their employment relations with the Government would be covered by provincial law. However, it appears to us that in fact the Federal Government as an employer would likely be immune from the operations of Provincial law on the basis of the theory of interjurisdictional immunity. (The entire question of interjurisdictional immunity is discussed by Professor Gibson in *Interjurisdictional Immunity in Canadian Federalism* (1969) 47 Can. B. Rev 40.). Again, however, in this case the Federal Government for reasons of its own chose not to utilize its own employees, but instead contracted with the respondent to do the work, work which falls outside the scope of the federal government's legislative authority over aviation.

27. In *Bachmeier Diamond and Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill and Smelter Workers' Local Union Number 1913* (1962) 35 D.L.R.(2d) 241, the Saskatchewan Court of Appeal held that the labour relations of a company, under contract to do drilling work for a Crown Corporation which had been declared to be a work for the general advantage of Canada, came within Provincial jurisdiction. In reaching this conclusion the Court decided firstly that the fact that the company was under contract to a Crown Corporation was not of itself sufficient to bring its activities within federal jurisdiction, and secondly that the work being engaged in was not an integral part of the work of the Crown Corporation. The correctness of the Court's factual conclusion on the second point has been questioned. See: Laskin, *Canadian Constitution Law* ed. A. Abel (4th ed., Toronto: Carswell, 1973) at 449. However, the general principle that because a private contractor engages to do work for a federal crown corporation does not necessarily bring the contractor's relations with its employees under federal labour relations legislation does not seem to have been challenged.

28. A case even closer to the one before us, in that it involved a contract directly between a private contractor and the Federal Government for work to be performed on federally owned land, is *Mid Valley Construction Limited v. Alberta Board of Industrial Relations* 74 CLLC para. 14,243. (Alta S.C.). In that case Mr. Justice Lieberman upheld a decision of the Alberta Board that it had jurisdiction to certify a Union with respect to employees of a private contractor engaged in the construction of a highway in a provincial park. The contractor was performing the work pursuant to a contract it had entered into with the federal Department of Public Works. At p 401 of the decision is contained the following comment:

“Counsel for the applicants sought to distinguish what is commonly known as the Jasper Park Lodge case on the basis that the Jasper Park Lodge was operated by the Canadian National Railways on property leased from the Federal Government within the Park, and that in the

case before me the employees applying for certification were employed by an independent contractor who contracted directly with the Department of Public Works and that the independent contractor had no interest, leasehold or otherwise in the land. I cannot distinguish the case on that basis.”

We would also note that the Colonial Coach Lines case referred to above involved a company operating under a lease from the Federal Government.

29. We are satisfied on the reasoning underlying these cases that the fact that the respondent entered into a contract with the Federal Government to perform certain activities on federally owned property does not bring its labour relations within the ambit of federal labour law. The work involved does not come within, nor is it necessarily incidental to, any subject matter falling within federal legislative jurisdiction. Therefore provincial labour relations law is applicable.

30. Our conclusion in this regard is not altered by the existence of the “Labour Conditions” attached to the contract. These conditions refer to, and appear to have been set down pursuant to, the *Fair Wages and Hours of Labour Act* R.S.C. 1970 C.L – 3. The purpose of that Act appears to be to ensure that certain minimum employment standards apply in certain situations where the Federal Government is involved. These standards are required by section 3 of the Act to be included in “every contract made with the Government of Canada for construction, remodelling repair or demolition of any work.” By section 4 of the Act they apply to “all workmen employed by the Government of Canada...and who are excluded from the operation of the *Public Service Employment Act*.” Section 5 goes on to provide that except in certain specified situations, before any grant is given for the construction, remodelling, repair or demolition of any work otherwise than for the Government of Canada, “the party intended to receive such grant or payment (whether the government of any province or any municipal or other body or any person or agency whatever)” shall be required to enter into an agreement with the Federal Government designed to insure the fair wages and hours of labour specified for in the Act.

31. It is apparent from the reading of the Act that the Fair Wages and Hours of Labour Act does not purport to extend federal jurisdiction over labour relations or to apply only to matters within federal jurisdiction. Indeed section 5 specifies that the “fair” conditions of work contemplated by the Act may even be provided for in an agreement with a provincial government. What the Act does seem to aim at is the ensuring that as far as possible any construction work done for the federal government or by the federal government or with federal government funds be performed under “fair” working conditions.

32. The work of the respondent at the airport is not work being done by workmen employed by the Government. Nor is it work being done for someone other than the government utilizing a government grant. Therefore, the labour conditions provided for in the appendix to the contract must arise out of section 3 of the Act, notwithstanding the fact that the contract is not for construction or related work. Section 3 of the Act, however, goes no farther than to state that contracts with the Federal Government must be subject to certain minimum conditions. It appears to us that these conditions are not made to apply because the federal government has or claims to have legislative authority over such contracts, but rather because the federal government as a contracting party has insisted upon them as a term of any such contract.

33. It is perhaps worth noting that the "Labour Conditions" attached to the contract make reference only to certain minimum conditions of employment with respect to "persons in the employ of the contractor" and do not purport to set either the actual pay rates or hours of work. Further, at the end of the "Labour Conditions" is contained a note in the following terms:

"The contractor should note that in carrying out any of the work contemplated by the contract, he may also be subject to provincial laws and regulations."

34. The schedule 'A' attached to the "Labour Conditions" lists certain classifications of labour and beside them certain wage rates. The wage rates are listed under the heading "rate of wages per hour not less than." At the end of the appendix A is contained a notice that the wage rates therein listed may be revised during the term of the contract, and also that the contractor may also be subject to provincial laws and regulations. Again the terms of the appendix 'A' make it clear that the purpose of the labour conditions attached to such a contract is to ensure that on work which the Federal Government contracts out certain minimum conditions of employment will be adhered to. In requiring the inclusion of such terms in the contract even the Federal Government acknowledges that provincial legislation may well apply to the work. In the instant case the work is being done within provincial jurisdiction, and thus The Labour Relations Act is applicable.

35. At the second hearing held in this matter the Board acceded to the respondent's request that persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period not be included in the same bargaining unit as the other employees. The parties then reached agreement on all matters relevant to the description of two bargaining units, except for the question of where the managerial line should be drawn. It was the contention of the applicant that supervisors should be included in the bargaining unit while the respondent pressed for their exclusion. In these circumstances Ms. J. Grimwood, Labour Relations Officer, is appointed to meet with the parties and to inquire into the duties and responsibilities of the persons classified by the respondent as supervisors.

36. We are satisfied that notwithstanding the issue of the status of the supervisors, more than 55 per cent of the employees in the bargaining unit comprised of full-time employees, on the date the application was made, were members of the applicant on March 28, 1978, the terminal date fixed for this application and the date which we determine, pursuant to section 92(2) (j) of The Labour Relations Act, as being the time for the purpose of ascertaining membership under section 7(1) of the Act and for the purpose of presenting any objections by employees to certification of the applicant.

37. We are also satisfied that notwithstanding the question concerning the status of the supervisors, more than 55 per cent of the employees in the bargaining unit comprised of persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at the time the application was made were members of the applicant on March 28, 1978.

38. There was filed with the Board a timely statement of desire in opposition to the application signed by 19 employees of the respondent, 13 of whom had applied for member-

ship in the applicant. The degree of overlap between these 13 employees, however, and the number of employees for whom the applicant submitted evidence of membership is not sufficient to cause us to doubt that as of the terminal date more than 55 per cent of the employees in both bargaining units still desired to be represented by the applicant. Thus the statement of desire, even if accepted as a voluntary signification of those who signed it, would not be sufficient to cause us to exercise our discretion to direct the taking of a representation vote in either bargaining unit.

39. At the second hearing, which was held on June 5, 1978, the representative of the group of employee objectors sought to tender two additional statements of desire in opposition to the application. We declined, however, to accept the statements in that they had not been filed with the Board prior to the terminal date. It should be noted in this regard that Form 5, the notice to employees of the application, specifically stated that any statements of desire in opposition to the application had to either be received by the Board, or mailed by registered mail to the Board, not later than the terminal date.

40. Having regard to the above, and to the provisions of section 6 (1a) of the Act, we hereby certify the applicant as the bargaining agent on behalf of all employees of the respondent at Terminals 1 and 2 at the Toronto International Airport save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

41. Also pursuant to the provisions of section 6(1a) we hereby certify the applicant as the bargaining agent on behalf of all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at Terminals 1 and 2 at the Toronto International Airport save and except supervisors, persons above the rank of supervisor, and office staff.

42. Formal certificates will have to await a final determination as to whether the bargaining units should be described so as to include or exclude supervisors.

DECISION OF BOARD MEMBER, C. G. BOURNE:

1. Notwithstanding my concurrence in the Board's earlier decision, I am now of the view that the Board does not have jurisdiction in this matter and therefore must, with respect, dissent from the decision of my colleagues.

2. While the authorities cited are very formidable, it is questionable whether they really bear on the central issue, because the matter turns on whether parking facilities, among others, are essential to the main operation – whether, in fact, they are “integral.”

3. Airports must surely be considered in their totality – as comprehensive and integrated units. Their changed structure from a few years back reflects the changed circumstances that surround urban living. Just as shopping malls and plazas have largely supplanted the old habits of “going downtown” to shop at one store after another, and just as condominiums, town houses and suburban enclaves now have their own shops and service centres, so have airports changed from simple arrival and departure procedures to large and varied complexes that administer to the needs of the travelling public.

4. It must be noted that the federal responsibility is for *aeronautics* – ; it does not extend to the operation of actual airlines but embraces the whole. It cannot, in reason, be deemed limited to “aircrew, persons who service and refuel aircraft, and to those who load luggage onto airplanes.” Events have moved airports well beyond those simple operations.

5. The majority decision quotes some comments by Rand, J., cited by Donohue J. in *Re Colonial Coach Lines Ltd.* which, in part, read:

“He (R and J.) points out that in a number of Privy Council cases, the enquiry has been whether a certain civil right was “*truly ancillary*” to Dominion legislation (railways) or “*necessarily incidental*” in another case, and “*incidentally*” in another.”

and again:

“These phrases assume that legislation on a principle subject matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that if the subordinate matter is reasonably required for the purposes of the principle or to prevent embarrassment to the legislation, its exclusion to that extent is legislative. This may be no more than saying that the incidental has a special aspect related to the principle. Actual necessity need not appear as the contracting out case shows; it is the appropriateness, on a balance of interests and convenience, to the main subject matter of the legislation.”

This lends support to the view that airports can be viewed as integral to “aeronautics”, and to the various facilities then that conduce to, and are necessary for, air transportation.

6. Airports, of necessity, are away from the heart of the city, in distinction to railway or bus terminals which are adjacent to taxis, hotels, restaurants and so on. One can walk, take private or public transportation to them, or one may reach them from hotels without going outdoors. Airports, because of their isolation (the large ones in any event), have to cater to a variety of needs. Passengers on inter-connecting flights, or held up by delays caused by weather or technical difficulties, have to be fed, and require facilities for small children, or for those taken ill. Airports, in short, handling thousands of long distance travellers, have to be miniature cities. It does not seem realistic to hold the federal responsibility for “aeronautics” to the narrow view of the actual flight preparation, and disregard the necessary services which supplement air travel. The provision of public parking is an essential concomitant to the airport.

7. I would, for the above reasons, dismiss the application.

0550-78-U The Board of Education for the City of Windsor,(Applicant), v The Ontario Secondary School Teachers' Federation, District 1 (O.S.S.T.F. District 1), (Respondent).

Strike – Union advising members not to enter into employment relationship with employer – Relationship not subject to collective bargaining or covered by collective agreement – Concerted refusal to enter into collateral employment relationship not a strike

BEFORE: E. Norris Davis, Vice-Chairman.

APPEARANCES: *T. H. Wilson, Charles Clark, Robert Feld and V. Bill Piliotis for the applicant; Leon Paraoian, Maurice A. Green, Jack Haines and R. J. Dumont for the respondent.*

DECISION OF THE BOARD: July 18, 1978

1. This is an application made under section 68 of *The School Boards and Teachers Collective Negotiations Act, 1975* for a declaration of unlawful strike. The matter came on for hearing on June 26 and June 28, 1978 and the parties were notified orally on June 30, 1978 of the decision dismissing the application. Formal written reasons are hereby provided.

2. The Windsor Board of Education and O.S.S.T.F. District 1 are parties to a collective agreement which is currently under negotiation for renewal. Section 64(1) of *The School Boards and Teachers Collective Negotiations Act, 1975* sets out six conditions precedent to be complied with before a legal strike may take place. There is no dispute but that District 1 has complied with all conditions save one, that of section 64(f) requiring the giving of five days written notice. Therefore any action or activity by members of District 1 which falls within the definition of "strike" as set out in section 1(1) of the Act which reads:

1. In this Act,

- (1) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed to curtail, restrict, limit or interfere with the operation or functioning of a school program or school programs or of a school or schools including, without limiting the foregoing,

would constitute a breach of section 66 of the Act which reads:

66. (1) The Federation shall not and no affiliate or branch affiliate shall call or authorize or threaten to call or authorize an unlawful strike.

3. The facts giving rise to the current application surround the setting up of a summer school by the Windsor Board to operate between July 4th, 1978 and August 11, 1978, which was approved by that Board at its meeting of January 1, 1978.

4. The summer school which has been operated for some fifteen years offers courses of instruction which are offered in three main areas, i.e. upgrading courses, credit courses and general interest courses. While staffing of summer school is ultimately dependent on

numbers of persons wishing to avail themselves of offered courses, it appears that required teaching staff would be between 90-100 teachers. This complement in past years has been filled by members of District 1 as well as by elementary school teachers, members of OECTA and members of District 34 O.S.S.T.F., as well as persons who have previously been in the teaching profession but were not in the 1977-78 school year so employed (none of the persons in the latter four classifications are within the bargaining unit represented by the present respondent). In the normal course the Windsor Board anticipated drawing staff from the same sources this year.

5. The Windsor Board circulated an information circular to all schools within its jurisdiction and to all schools in Essex County announcing its 1978 Summer School and inviting applications for summer school teaching employment. Application forms were stated to be available from the school principal and a terminal date for filing applications set for May 31, 1978.

6. On May 9, 1978 the respondent union passed a resolution in support of its negotiating demand in the following terms,

"Whereas District 1 OSSTF is suggesting that Summer School and Night School teaching be included in any new contract as an integral part of the school system and teaching load, Be it Resolved that members of District 1 OSSTF not teach Summer School for the Windsor Board of Education in 1978 and that District 1 encourage Elementary School Teachers, members of OECTA at the secondary level, and members of District 34 OSSTF to support the motion by not applying for these positions".

A copy of this resolution was circulated to all District 1 members by its President Mr. Jack Haines and steps also taken to enlist the support of other teaching affiliates.

7. The Windsor Board's procedure in dealing with applications for employment was first to adjudge whether the applicant was qualified and experienced for the available positions, and then to send to the applicant what is described as a "letter of assignment" offering a teaching assignment contingent "upon the development of an adequate enrollment". This was clearly an offer by the Board of employment and was recognized by the Board as not creating any contract of employment but was specifically stated to be subject to the addressee to whom the letter was directed notifying the Board of non-acceptance by a specific date.

8. Up to June 23, 1978 the Board received a total of 96 applications for summer school employment which resulted in 73 letters of assignment being sent out between June 7th and June 26th. There was acceptance of assignment by 14 persons (although 3 subsequently withdrew their acceptances) and a withdrawal of applications for employment by 53 persons. While a few withdrawals were stated to be for personal reasons such as vacation plans etc, most were couched in terms of "due to circumstances" or more specifically as being in compliance with the District 1 resolution.

9. At the time of the hearing of this matter it was established that student registration was down considerably from prior years.

10. The lack of available applicants for summer teaching jobs, in our judgment, is due in large part to the position of District 1 as expressed in its resolution of May 9, 1978 and the withdrawal of applications by District 1 members was not the cumulative result of individual actions but a concerted activity.

11. The question to be decided is whether such concerted activity falls within the prohibition set out in section 66 of the Act.

12. It is necessary to set out, at this stage, the relationship existing between the Windsor Board and those teachers who are members of District 1 O.S.S.T.F. Critical segments of this relationship are statutorily imposed, starting with the individual teacher's contract of employment which must be in the form prescribed by regulations made under The Education Act, 1974. This form of contract recites its commencement date and is for an indefinite term and provides the contract may be terminated by mutual consent, or on December 31st or August 31st of any year subject to prescribed notice periods.

13. The contract of employment also provides, inter alia, for the payment of an annual salary in not less than ten installments (in which case a payment must be made "on or before the last teaching day of each month); if annual salary is made in more than ten installments any unpaid balance becomes payable on or before the last teaching day in June". *The School Boards and Teachers Collective Negotiations Act, 1975* provides in section 55 that the collective bargaining agreement applicable to a school where the teacher is employed is imported into and forms part of the contract but no such collective agreement "shall conflict with the form of contract prescribed".

14. It is clear to me that the contract does not envisage teaching duties other than during the regular school year which is defined by regulations under the Education Act as commencing "on the day following Labour Day and end on the 30th day of June." and "shall include at least 185 instructional days". Neither the Windsor Board nor the respondent union argue that the projected teaching at summer school would be covered by this employment contract and in fact in a document prepared by the Windsor Board and filed with us the statement is made:

"All these teachers are not employed under a contract prescribed by the Ministry of Education. The practice of the Board is to hire them on an hourly basis without any benefits or other working conditions such as tenure, P.T.R., class size etc. that are provided for in this agreement. In addition, there is no obligation on the Board's part to continue employing these teachers".

15. It therefore becomes clear that the question that we are dealing with here does not relate to any obligations or responsibilities which arise out of the individual employment contract or of the collective agreement. The issue is whether such persons have the right, in concert, to refuse to offer to enter into a new employment relationship with the same employer with different remuneration practices and working conditions.

16. A logical extension of this position would result in any person employed under a statutory contract with any Board of Education in the Province to whom notice had come of the Windsor Board's solicitation of applications for summer school to be similarly caught

by the proscription against concerted activity. Such a result would represent a broadening of more normal definitions of "strike" to include persons not in the employ of the employer. The definition of "strike" in section 1(1) of the Act is indeed a very wide one and the Windsor Board would argue that the persons with whom we are here involved are teachers as defined by section 1(m) and that the refusal to make application for summer school employment as well as the withdrawal of an application made fall within "any action or activity by teachers ... in concert ... designed to ... interfere with the operation of functioning of a school program ... or of a school". The respondent union takes the position that we must look to the fact that a summer school teacher is not a "teacher" as defined by section 1(m), is not covered by *The School Boards and Teachers Collective Negotiations Act, 1975* and therefore this activity is not proscribed by section 66 of the Act.

17. If we look to the general scheme of the Act there is no doubt that it is intended to regulate collective bargaining on behalf of persons who are employed under a contract prescribed by the Ministry of Education and to further harmonious relations between School Boards and teachers by "providing for the making and renewing of agreements and by providing for the relations between boards and teachers in respect of agreements". To that end a statutory framework is provided within which bargaining agents are designated, structuring of negotiation formats (including Fact Finding, Voluntary Binding Arbitration, Final Offer Selection) and a defining of the final resort by both parties to the application of economic sanctions in order to conclude an agreement. Nowhere, in the Act, do we find any reference to summer school programs (which is not a mandatory activity of a Board of Education but in the same order as evening classes and special education programs under section 147 of *The Education Act*) and the whole scheme of the Act is to focus on relations between teachers and school Boards during the course of the regular school year (as defined by *The Education Act*).

18. Under such circumstances can we conclude that "school program" and "schools" as the terms are used in section 1(1) relate to school programs and schools outside the ambit of the general subject matter of the statute? We think not. Where the Legislature throughout the statute has directed itself solely to collective bargaining facets concerned with teachers and Boards integral to the regular school year it would in our view, in the absence of explicit language, be wrong to consider that the Legislature in this one section of the Act (Section 1(1)) intended to refer to school programs or schools other than those to which the Act in general applies. This conclusion, we believe, is fortified when one looks to the enumerated activities in section 1(1) which are to fall within the general definition. These are:

- (i) withdrawal of services,
- (ii) work to rule,
- (iii) the giving of notice to terminate contracts of employment;

The one common denominator running through the above enumerated activities is that they all envisage a disruption of the employer's operations by *employees* in some manner restricting their services which are required in their normal employment relationship, i.e. during the regular school year. There is no such factor involved here but rather it is a refusal by District 1 members (who have a separate employment relationship with the Windsor Board, not relevant to summer school to take on an employee status by entering into a separate and

new employment relationship outside of the regular school year. The evidence establishes that the Windsor Board is not obligated to draw its summer school staff from this group and would be prepared to staff this program with persons who have never had any relationship with the Windsor Board. We see no obligation on such persons to not concertedly refuse to make application for employment and we can see no higher obligation, in these circumstances, fastening on members of District 1.

19. For these reasons I have found that the complained of activities do not constitute a strike within the meaning of section 1(1) of the Act and that there is therefore no breach of section 66(1) (2) of the Act.

20. The application is dismissed.

0326-78-U Labourers' International Union of North America, Local 183, (Complainant); v. **York-Hanover Developments Ltd.**, John Holgate, Gabor Preczner, Christine Swabey, R. Bendak, G. Deroche, K. Dechamps, W. Walker, and Evangelos Marantos, carrying on business as Perfect Metro Cleaners, (Respondents).

S-79 – Discharge for Union Activity – Building owner terminating cleaning subcontract and carrying on cleaning functions directly – Owner refusing to continue employment of existing cleaners because of their union affiliation – Unfair practice claim sustained

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and C.G. Bourne.

APPEARANCES: *T. Kuttner, B. Yandell and T. Spada for the complainant; Kevin J. Mahan, John Holgate and Evangelos Marantos for the respondents.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER D.B. ARCHER: July 4, 1978

1. The names "York-Hanover Developments Ltd., John Holgate, Gabor Prezner, Christine Swabey, R. Bendal, G. Derash, K. Descham, W. Walker, and Evangelos Marantos, carrying on business as Perfect Metro Cleaners" appearing in the style of cause of this complaint as the names of the respondents are amended to read: "York-Hanover Developments Ltd., John Holgate, Gabor Preczner, Christine Swabey, R. Bendak, G. Deroche, K. Deschamps, W. Walker, and Evangelos Marantos, carrying on business as Perfect Metro Cleaners."

2. This is a complaint filed under Section 79 of the Act alleging that York-Hanover Development Ltd. and certain named employees of York-Hanover Developments Ltd. and Evangelos Marantos carrying on business as Perfect Metro Cleaners violated sections 3, 56, 58(a), (b), (c), 59(1) and 61 of The Labour Relations Act. In addition, the complainant seeks

an order from the Board under section 1(4) of the Act declaring that York-Hanover Developments Ltd. and Perfect Metro Cleaners constitute a single employer for purposes of the Act.

3. During the course of the hearing in this matter the complainant advised the Board that it was no longer seeking the Section 1(4) declaration and was withdrawing its complaint against Evangelos Marantos carrying on business as Perfect Metro Cleaners.

4. The complainant alleges that York-Hanover, the owner of a number of apartment buildings, violated the Act in that it did discharge Antonio Aguanno, Srinarain Cheta, Ewart Harvey, Constance Mathers, Rafeek Mohammed, Alvin Romeo and Reshed Sardar-alo from its employ as assistant resident superintendents and/or building cleaners contrary to the provisions of the Act. Alternatively, the complainant alleges that the respondent, York-Hanover, refused to employ these persons contrary to the provisions of the Labour Relations Act.

5. The above named persons were building cleaners and/or assistant resident superintendents at the following locations:

- (i) Lawrence Park Apartments
1577 Lawrence Avenue West
Toronto, Ontario
- (ii) Lawrence Terrace Apartments
1440, 1442 Lawrence Avenue West
Toronto
- (iii) Grand View Apartments
335 Grand Ravine
Downsview, Ontario

6. The above properties were owned by Deltan Realty until mid-April, 1978 at which time they were sold to York-Hanover Developments Ltd. During the period it owned these properties Deltan contracted-out the cleaning and maintenance to Khan Janitorial Service. It cancelled the contract with Khan Janitorial Service effective April 1, 1978, however, and entered into a contractual arrangement with Perfect Metro Cleaners as of April 6, 1978. The applicant union was party to a collective agreement with Khan Janitorial Service covering the cleaners at these locations who were resident in the Deltan buildings at all material times. When the contract with Khan was terminated by Deltan the union signed a voluntary agreement with Perfect Metro. Perfect Metro agreed to employ the same cleaners who had worked for Khan Janitorial Services and who were already resident in the Deltan Buildings. Perfect Metro's contract was in turn terminated by York Hanover (who had purchased the buildings in mid-April) by letter dated April 28. The resident cleaners continued to work but were prevented from continuing to do so by York Hanover on May 2nd. The union alleges that this action by York-Hanover constitutes either a mass discharge contrary to the Act or a refusal to hire, also contrary to the Act.

7. The Board has reviewed the evidence as it relates to the relationship between York-Hanover and the resident cleaners in the period mid-April to May 1, 1978; the period

during which York Hanover had control of the buildings and the grievors were working in the buildings. There is no evidence that the relationship was any different than it had been when Deltan owned the buildings. Direct control was exerted by Mr. Marantos who visited each of the sites daily. The York-Hanover building managers did not have a direct supervisory role over the cleaners. The Board is satisfied that they were responsible for monitoring the performance of Perfect Metro vis-a-vis its contractual obligations and in this regard complaints were directed to Mr. Marantos. Mr. Marantos paid the building cleaners. The complainant union signed a collective agreement with Perfect Metro covering the grievors and in the absence of evidence to the contrary the Board must assume that the terms and conditions of employment covering the grievors were a matter of negotiation between the union and Perfect Metro. The Board is satisfied that the grievors were employed by Perfect Metro in the period when Perfect Metro held the contract to provide cleaning and maintenance services at the buildings listed at para. 5 herein. The issue to be decided, therefore, is whether, after it had terminated Perfect Metro's contract, York Hanover refused to employ the named grievors because of their trade union affiliation.

8. An employer bears the burden of proving that it did not act contrary to the Act in a section 79 complaint which falls within the ambit of Section 79(4a). The employer must prove that it did not violate the Act and in doing so it must establish certain facts on the balance of probabilities. The Board succinctly outlined the extent of the onus in the *Barrie Examiner* case [1975] OLRB Rep. Oct. 745, wherein at paragraph 17 the Board stated:

"Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons, and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

The Board further commented in *The Corporation of the City of London* case, [1976] OLRB Rep. Jan. 990 that:

"Simply put, the respondent must put forward a credible explanation free from anti-union motive which is established on the balance of probabilities as the only reason or reasons which precipitated the impugned activity. ..."

9. Mr. John Holgate was called to testify on behalf of the respondents. He is under contract with York-Hanover as property manager of the buildings at the three locations with which we are concerned in this matter. He testified that he decided "that it was against the policy of York-Hanover to put cleaning responsibilities on to contract cleaners – we put it on to the superintendent or the assistant. It is not consistent with company policy to put it to persons we don't have control over – 24 hours a day as needed." He testified that immediately upon discovering the cleaning arrangements then in existence he made a decision "to change to our normal way" and terminated the contract of Perfect Metro. It was revealed in cross-examination that the buildings at the sites with which we are dealing are the first residential buildings owned by York-Hanover. Mr. Holgate testified in cross-examination that the policy he was referring to was one that he recommended to York-Hanover in

the last week in April and which was approved immediately. The decision to terminate Perfect Metro's contract, therefore, was not made on the basis of a long-standing company policy but on the basis of a policy decision which was taken by York Hanover in the last week of April, 1978. Mr. Holgate testified that he placed an advertisement in the press for building superintendents in the last week of April and personally interviewed the candidates. The evidence before the Board is that only one person was hired prior to May 2, 1978 to act as a building superintendent.

10. On April 30th Mr. Marantos notified the cleaners at the York-Hanover sites that his contract had been terminated. He informed them, however, that it was his understanding that they would continue to clean the buildings as they had done before he had employed them. The cleaners continued to work on May 1st but found that the locks to the storage cupboards had been changed when they attempted to secure supplies on the morning of May 2nd. Mr. Holgate testified that he ordered the locks changed when informed by the building managers on May 1st that the cleaners were still working. He explained that he took this decision for security reasons. The cleaners approached the building manager and were informed that Mr. Holgate had ordered the locks changed. Both Mr. Aguanno and Mr. Sardaralo, two of the cleaners who had worked for Perfect Metro and who were residents in the buildings, testified that they asked for work but have not been hired by the respondent. The cleaners congregated about the lobby of the Lawrence Park apartments at various times on and following May 2nd.

11. The evidence establishes that Mr. Holgate was aware of the fact that the resident cleaners employed by Perfect Metro were unionized from the third week of April; one week before he proposed to the principals of York-Hanover that they assume direct control over the cleaners. He was informed of this fact by Mr. G. Preczner, the property manager at the Lawrence Terrace apartments.

12. Mr. G. Preczner admitted in his evidence that he said to Rafeek Mohammed, one of the grievors, "it is not you we want out of here it is the union." He explained that he made the statement to make Mr. Mohammed "feel good" because he was without a job. Mr. Preczner's explanation is unconvincing.

13. Mr. Holgate was asked why he did not approach any of the grievors with a view to hiring them to work in the York-Hanover buildings. He replied that they were employed by another company and he assumed they would be sent to work elsewhere. He denied that any of the grievors had sought work and stated that it would have been unethical for him to have attempted to hire them away from Perfect Metro. There is no evidence that any of the cleaners had not performed satisfactorily and indeed, Mr. Holgate's evidence was not that Perfect Metro's contract had been terminated for unsatisfactory work, but rather that it had been terminated because of a decision to assume direct control over the cleaners.

14. Mr. Holgate's explanation for his failure to hire the resident cleaners is unconvincing at best. On the one hand Mr. Holgate, in explaining his decision to terminate Perfect Metro's contract, testified that cleaning is one of the most important duties of building management and as such requires direct owner control. On the other hand, he bypassed the grievors at a time when he was advertising for building cleaners. The grievors were resident in the buildings and had satisfactorily cleaned the buildings in the past. The explanation offered by Mr. Holgate for his failure to approach persons who were ready-made for the job

at a time when the buildings were without a full complement of cleaners was his concern that it would not have been ethical to approach the employees of another employer.

15. Even if we were to accept that Mr. Holgate's sense of ethics would not allow him to approach persons who were already employed, the evidence in this case does not support Mr. Holgate's assertion that he was of the view that the resident cleaners continued to be employed by Perfect Metro and would be transferred elsewhere. If Mr. Holgate was ever of this view it was surely dispelled when he was informed on May 1st that the grievors were still working in the York-Hanover buildings. His response to this information was not to contact Perfect Metro and ascertain the employment status of persons who were resident in the buildings, knew the buildings and had satisfactorily cleaned the buildings in the past. Mr. Holgate's response was to order that locks be changed so as these persons could not work. The Board is satisfied that as of May 1st Mr. Holgate knew that the resident cleaners were no longer employed by Perfect Metro and accordingly, his explanation as to why he did not offer employment to the grievors at a time when he was advertising for building cleaners must be dismissed as not credible.

16. Although the grievors may not have made formal application for work in the period following May 1st the evidence establishes that at least two of them approached York-Hanover property managers for work and the others, by their actions, clearly indicated to the company that they were available and seeking work. The company refused to employ the grievors and in the face of the company's knowledge of their trade union affiliation, in the absence of a credible explanation for the refusal to hire, and having regard to the statement made by Mr. Preczner, a York-Hanover building Manager, to Mr. Mohammed –

“It is not you we want out of here – it is the union.”,

the Board is compelled to find that the respondent refused to employ the grievors contrary to the provisions of Sections 56 and 58 of The Labour Relations Act.

17. The Board has not found on the evidence that York-Hanover violated the Act when it terminated its contract with Perfect Metro. The finding of the Board is that York-Hanover violated the Labour Relations Act when, subsequent to terminating its contract with Perfect-Metro, it refused to employ the building cleaners who are named in para. 4 herein. In framing a remedy, therefore, the Board must attempt to place the grievors in the position they would have been in had there been no breach of the Act. The Board makes two observations in this regard. Firstly, the grievors cannot be considered as if they were “off the street” job applicants competing on an equal footing with other “off the street” job applicants. These persons had proven abilities and were clearly more qualified for the cleaning jobs at these buildings than any “off the street” candidate. Secondly, the company was changing its mode of operation and was entitled to employ either a greater or lesser number of cleaners under terms and conditions unilaterally determined by itself. If the Board had been called upon to frame a remedy immediately following the employer's unlawful refusal to employ, its task would have been considerably more difficult than it is now; some two months following the employer's unlawful activity. In the interim York-Hanover has hired a working complement of building cleaners and has unilaterally set the terms and conditions of their employment. These company determinations allow the Board to shape its remedy without having to speculate on matters which are central to a meaningful remedial order.

18. Having regard to the foregoing and pursuant to the Board's remedial authority under section 89 of the Act, the Board hereby orders York-Hanover to offer employment to the seven named grievors in the order of their total individual continuous service at these three properties. The respondent employer need only offer employment to the same number of grievors as there are persons presently employed in the cleaning of the properties named in paragraph 5 herein. The respondent employer is ordered to offer terms and conditions of employment under which those hired subsequent to May 1, 1978 are presently working. The grievors who are offered and accept employment on the terms set-out above are to be compensated in an amount equal to the direct wages and other benefits which they would have received had they been employed by the respondent from May 1, 1978. In the event the complement of cleaners has been decreased by York-Hanover those who are not offered employment immediately following release of this decision are to be given first preference for future vacancies. When future vacancies arise they are to be offered employment on the basis of the terms and conditions which are in existence at the time.

19. The Board will remain seized of this matter in the event the parties are unable to implement its remedial order.

DECISION OF BOARD MEMBER C.G. BOURNE

1. I must dissent from the findings of the majority of the Board. It is evident to me that, just as the respondent had every right to terminate the janitorial contract with Perfect Metro Cleaners (as the previous owner had done with Khan Janitorial Services) it was done so that the new employers could arrange for these services themselves without any suggestion of anti-union bias. Mr. Holgate's evidence appeared to be unbiased and credible.

2. The cases cited by the Board – the *Barrie Examiner* and the *City of London* had to do with actual employees of them, not with contracts for service which is the situation here.

4. I would dismiss the application.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1978

BARGAINING AGENTS CERTIFIED DURING JUNE

No Vote Conducted

1333-77-R: Graphic Arts International Union, Local 28B, Toronto (Applicant) v. The Hunter Rose Company (Respondent).

Unit: "all employees of the Company in Metropolitan Toronto, save and except working foremen, persons above the rank of working foreman, office and clerical staff, sales staff, employees covered by subsisting collective agreements, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in the unit).

1389-77-R: Canadian Union of Public Employees (Applicant) v. Fort Frances & District Association for the Mentally Retarded (Respondent).

Unit: "all employees in the employ of the respondent at its residence and workshop in Fort Frances, Ontario, save and except director, persons above the rank of director and manager." (11 employees in the unit).

1450-77-R: Hotel and Club Employees' Union, Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders International Union. (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Seaway Towers Motor Hotel (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, Maitre D', hostess, cashiers, front desk clerks, persons regularly employed for not more than 24 hours per week and banquet employees." (31 employees in the unit). (*Having regard to the agreement of the parties*).

0025-78-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Nags Head Tavern Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all full time and part time bartenders, tapmen, waiters male and female, bar-boys and improvers in the employment of the respondent at the Nags Head Restaurant, Eatons Centre, 220 Yonge Street, Toronto, Ontario, save and except manager and those above the rank of manager." (16 employees in the unit).

0101-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions, 1316, 1617, 785 and 2041 (Applicant) v. Dominion Drywall Contractors (Respondent) v. The Wood, Wire and Metal Lathers' International Union, Local 562 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the

County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. June).

0113-78-R: Canadian Union of Public Employees (Applicant) v. Madonna Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the Madonna Nursing Home in Orleans in the Regional Municipality of Ottawa Carleton save and except professional medical staff, graduate nursing staff, undergraduate nursing staff, supervisors, persons above the rank of supervisor, Activities Director, technical and office staff, persons regularly employed for 24 hours per week or less and students employed during the summer vacation period." (20 employees in the unit).

Unit #2: "all persons regularly employed for twenty-four hours per week or less and all students employed during the summer vacation period in the employ of the Madonna Nursing Home in Orleans in the Regional Municipality of Ottawa Carleton form a unit appropriate for collective bargaining." (14 employees in the unit).

0211-78-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Restfulcare Incorporated (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent at Meadow Park Nursing Home at 1210 Southdale Road East, London, save and except supervisors, persons above the rank of supervisor, activities co-ordinator, registered nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and office staff." (18 employees in the unit). (*clarity note* – Report of full decision (1978) OLRB Rep. June).

0236-78-R: United Steelworkers of America (Applicant) v. Canadian Industries Limited Explosives Division, Garson, Ontario Works (Respondent).

Unit: "all employees of the respondent employed at the Explosives Division in the Regional Municipality of Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff." (10 employees in the unit). (*Having regard to the agreement of the parties*).

0240-78-R: International Association of Bridge, Structural and Ornamental Ironworkers Local Union 721 (Applicant) v. Orillia Steel Works Inc. (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (36 employees in the unit).

0244-78-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Society for Goodwill Services (Respondent).

Unit: "all truck drivers, helpers and towmotor operators of the respondent working at and out of Metropolitan Toronto, save and except dispatcher and assistant dispatcher, foremen, those above the rank of foreman, office and sales staff." (83 employees in the unit).

0267-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Advanced Cooling Systems Inc. (Respondent) v. Local 787 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0297-78-R: Local 1590, International Brotherhood of Electrical Workers (Applicant) v. Cable Tech Wire Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Whitchurch Stouffville save and except foremen, those above the rank of foreman, office, technical and sales staff and students employed during the school vacation period." (106 employees in the unit). (*Having regard to the agreement of the parties*).

0324-78-R: International Association of Bridge Structural and Ornamental Ironworkers Local Union 721 (Applicant) v. Beckman & Gough Mechanical Contractors Ltd. (Respondent).

Unit: "all reinforcing rodmen in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0329-78-R: Laundry, Dry Cleaning & Dye House Workers International Union, Local 351 (Applicant) v. Comfy Home Furnishings, A Division of Silknit Limited (Respondent).

Unit: "all employees of the respondent at its plant at 500 Keele Street, Toronto, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (48 employees in the unit). (*Having regard to the agreement of the parties*).

0333-78-R: Lumber & Sawmill Workers' Union Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Byers Construction Co. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit). (*Having regard to the foregoing*).

0335-78-R: International Association of Machinists & Aerospace Workers (Applicant) v. F. Lepper and Son Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff, sales staff, draughtsmen, and students employed during the school vacation period." (47 employees in the unit). (*Having regard to the above considerations and the representations of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. June).

0337-78-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L. – C.I.O. – C.L.C. (Applicant) v. Cloverleaf Hotel Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all full time and part time male and female bartenders, tapmen, barmaids, waiters, waitresses, bar-boys and bar-girls, in the employ of the beverage lounge of the main floor of the Cloverleaf Hotel, Toronto, Borough of Etobicoke, save and except the assistant manager and persons above the rank of assistant manager." (17 employees in the unit). (*Having regard to the agreement of the parties*).

0352-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Windsor News, A Division of Benjamin News Company Limited (Respondent).

Unit: "all office and clerical employees of the respondent in Windsor, save and except supervisors and those above the rank of supervisor and students employed during a summer vacation period." (8 employees in the unit).

0353-78-R: Local Union 636 International Brotherhood of Electrical Workers A.F.L. – C.I.O. – C.L.C. (Applicant) v. Hydro-Electric Commission of the Borough of Etobicoke (Respondent) v. Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the Borough of Etobicoke, save and except foremen, those above the rank of foreman, one secretary each to the General Manager, Secretary-Treasurer, Personnel Officer, and Construction Engineer, Data Processing Analysts and Programmers, Payroll Clerk, persons employed for not more than 24 hours per week, students employed during the summer vacation period and those persons covered by an existing agreement between the applicant and the Commission dated October 19, 1977." (66 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. June).

0354-78-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L. – C.I.O. – C.L.C. (Applicant) v. Queensbury Inn Enterprises Inc. (Respondent).

Unit: "all part-time and full-time bartenders, waiters, bus boys, door persons, cooks, kitchen help, snack bar attendants, coat check staff, hostesses and clerks employed by the respondent in Metropolitan Toronto, save and except managers and persons above the rank of manager." (39 employees in the unit). (*Having regard to the agreement of the parties*).

0361-78-R: Local Union 785, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Toronto Dominion Bank Forces (Premises Division) (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0380-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Alberts Concrete Floor Finishing Company (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #1) v. General Contractors' Section of Toronto Construction Association (Intervener #2).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0383-78-R: Labourers' International Union of North America; Local 183 (Applicant) v. Athenian Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0384-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Dale Electronics, Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in London, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for 24 hours per week and students employed for the school vacation period." (47 employees in the unit).

0386-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL – CIO – CLC (Applicant) v. Canadian Cannery Limited (Respondent).

Unit: "all office clerical employees at the St. Davids plant save and except office supervisor, personnel administration clerk, those above the rank of office supervisor, and personnel administration clerk, part time employees working less than 24 hours per week and seasonal employees". (4 employees in the unit).

0391-78-R: Retail Clerks Union, Local 409, chartered by the Retail Clerks International Union; CLC, AFL-CIO (Applicant) v. Manestic Manor (Respondent).

Unit: "all employees of the Respondent at Kenora, Ontario regularly employed for not more than 24 hours per week and students employed during the vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman and office staff." (5 employees in the unit).

0394-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Nick Giamberardino & Bros. Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the County of Ontario (except the Township of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. June).

0398-78-R: Ontario Nurse Association (Applicant) v. Sudbury Nursing Homes Limited (Respondent).

Unit: "all registered and graduate nurses employed by the Sudbury Nursing Home, Sudbury, Ontario, in a nursing capacity save and except the Director of Nursing, persons above the rank of Director of Nursing and students employed during the school vacation period." (12 employees in the unit). (*Having regard to the agreement of the parties*).

0399-78-R: Ontario Nurses Association (Applicant) v. St. Magdelene Nursing Home Limited (Respondent).

Unit: "all registered and graduate nurses employed by the St. Magdalene Nursing Home, Hamilton, in a nursing capacity save and except the Director of Nursing and persons above the rank of Director of Nursing." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0400-78-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Trans Western Express Company (Respondent).

Unit: "all employees of the respondent engaged as owner/operator truck drivers (dependent contractors) working out of the Town of Vaughan, Ontario save and except dispatchers, those above the rank of dispatcher, office and sales staff and persons represented by a subsisting collective agreement." (10 employees in the unit). (*Having regard to the agreement of the parties*).

0402-78-R: Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. A. F. & W. Systems Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

0403-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Con - Tec Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa - Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

0407-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Direzione Lavori of Canada Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0410-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. M. A. Butt Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0412-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Gordon Acri and Sons Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of

Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0416-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. McInnis Equipment Ltd. (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0431-78-R: United Brotherhood of Carpenters & Joiners of America, Local Union 1669 (Applicant) v. P. L. S. Construction Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0437-78-R: Service Employees’ Union, Local 210, Windsor Affiliated with Service Employees’ International Union (Applicant) v. Windsor Western Hospital Centre Inc. (Respondent).

Unit: “all employees of the respondent at its I.O.D.E. Unit and its Riverview Unit in Windsor, Ontario, employed as laboratory technologists and laboratory assistants, save and except physicians, chief laboratory technologist, assistant chief laboratory technologists, persons above the rank of Assistant Chief Technologist, students in training and employees covered by subsisting collective agreements.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

0441-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Ka-Be Enterprises (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (000 employees in the unit).

0448-78-R: Greco Paving Ltd. Employees Association (Applicant) v. Archy Greco Paving Limited (Respondent).

Unit: “all employees of the respondent at North Bay, Ontario save and except supervisors and persons above the rank of supervisor.” (13 employees in the unit).

0451-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Glanbrook (Respondent).

Unit: “all arena and roads department employees of the respondent in the Township of Glanbrook save and except office staff, arena managers, roads foremen and those above the rank of arena manager and roads foreman, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

0460-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Subito Contracting Drywall & Painting Co. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0461-78-R: Christian Labour Association of Canada (Applicant) v. Orillia Steel Works Inc. (Respondent).

Unit: "all ironworkers, ironworkers' apprentices, millwrights and millwrights' apprentices in the employ of the respondent in the Townships of Kerns, Harley, Casey, Hudson, Dymond, Harris, Firstbrook and Bucke." (3 employees in the unit). (*Having regard to the foregoing*).

0462-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. W. C. D. Forming Co. (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the City of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

0464-78-R: Hotel & Restaurant Employees & Bartenders International Union Local 756 A.F.L., C.I.O., C.L.C. (Applicant) v. United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) – Local 1451 (Respondent).

Unit: "all bartenders, save and except those regularly employed for not more than 24 hours per week at 600 Wabawaki Drive, Kitchener, Ontario." (3 employees in the unit).

0465-78-R: United Textile Workers of America (Applicant) v. AAF Limited (Respondent).

Unit: "all employees of the respondent at its plant in Brampton, Ontario, save and except foremen, those above the rank of foremen, office staff, quality control staff, service men and sales staff." (12 employees in the unit). (*Having regard to the agreement of the parties*).

0474-78-R: Christian Labour Association of Canada (Applicant) v. P. Venema Construction Limited (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0477-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oshawa Concrete Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

0479-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. H. M. Brooks (Oshawa) Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0482-78-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Stax Plastics Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office and sales staff, and students employed during the school vacation period.” (26 employees in the unit).

0486-78-R: Graphic Arts International Union, London Local 517 (Applicant) v. Devon Studio (Respondent).

Unit: “all employees employed by Devon Studio in the City of Windsor, save and except non-working foremen, persons above the rank of non-working foremen, office and sales staff.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0491-78-R: The United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Canadian Store Fixtures Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0492-78-R: Christian Labour Association of Canada (Applicant) v. Tru-Con Limited (Respondent).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*Having regard to the foregoing*).

Applications Certified Subsequent to Pre-Hearing Vote

0179-77-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Canadian Engineering and Contracting Co. Limited (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association, Local 298 (Intervener).

Unit: “all cement masons and cement masons’ apprentices in the employ of the respondent engaged in cement finishing work in the industrial, commercial and institutional sector in the Counties of Halton, Wentworth and Halidimand, and the Township of Caistor, North and South Grimsby in the County of Lincoln, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		1
Number of persons who cast ballots		1
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	0	

1289-77-R: Teamsters Local 879 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Preston Sand & Gravel Company Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all employees of the respondent working in the Province of Ontario, save and except batcher-dispatchers, foremen, those above the rank of batcher-dispatcher and foreman, office and sales staff and students employed under the Co-operative Engineering Program." (20 employees in the unit).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots		18
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of intervener	6	

1509-77-R: Laundry, Dry Cleaning and Dye House Workers' International Union Local 351 (Applicant) v. Toronto (Harbour Castle) Hilton Hotel (Respondent) v. Hotel and Club Employees' Union, Local 299 of Hotel and Restaurant Employees and Bartenders International Union (Intervener).

Unit: "all employees of the Respondent employed at its Hotel in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, front desk staff and students in a community college hotel management course who work without remuneration for the Respondent as part of their program of studies." (806 employees in the unit).

Number of names of persons on revised voters' list		991
Number of persons who cast ballots		379
Ballots segregated and not counted	3	
Number of spoiled ballots	5	
Number of ballots marked in favour of applicant	215	
Number of ballots marked in favour of intervener	156	

1884-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Continental Concrete Finishing Limited (Respondent) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voter's list		14
Number of persons who cast ballots		12
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of intervener	1	

2004-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Duron Ontario Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Counties of York and

Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (40 employees in the unit).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	14	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	10	
Number of segregated ballots cast by persons whose names do not appear on voters' list	4	

Ballot Box Sealed

0070-78-R: Canadian Chemical Workers Union (Applicant) v. Rothsay Concentrates Co. Limited (Respondent) v. Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chaffeurs, Warehousemen & Helpers of America (Intervener).

Unit: “all employees of Rothsay Concentrates Co. Limited at or working out of its plant at Rothsay, in the Township of Maryborough in the County of Wellington, save and except foremen, persons above the rank of foreman, office, sales staff, security personnel and stationery engineers.” (96 employees in the unit).

Number of names of persons on revised voters' list		88
Number of persons who cast ballots	84	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	53	
Number of ballots marked in favour of intervener	30	

0088-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dafoe Metallicrete Floor Co. Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: “all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of intervener #2	0	

0231-78-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Westcane Sugar Limited (Respondent) v. Local 796 International Union of Operating Engineers (Intervener).

Unit: “all Stationary Engineers and persons primarily engaged as their helpers in the boiler room of Westcane Sugar Limited at its Oshawa, Ontario plant, save and except the Chief Operating Engineers, and persons above the rank of Chief Operating Engineers.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer			6
Number of persons who cast ballots		5	
Number of ballots marked in favour of applicant	4		
Number of ballots marked in favour of intervener	1		

0351-78-R: International Woodworkers of America (Applicant) v. Blind River Veneer Limited (Respondent).

Unit: "all employees of Respondent, Blind River, Ontario, save and except foremen, persons above the rank of foreman, scalers, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list			17
Number of persons who cast ballots		15	
Number of ballots marked in favour of applicant	11		
Number of ballots marked against applicant	4		

Applications Certified Subsequent to Post-Hearing Vote

1881-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Malen Steel & Salvage Company Limited (Respondent) v. Labourers' International Union of North America, Local 625 (Intervener #1) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener #2).

Unit: "all Construction Labourers of Malen Steel & Salvage Company Limited performing work coming within the Industrial, Commercial and Institutional Sector with the county of Essex save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer			1
Number of persons who cast ballots		1	
Number of ballots marked in favour of applicant	1		
Number of ballots marked in favour of intervener #1			
Labourers' International Union of North America, Local 625	0		

0063-78-R: Canadian Union of Public Employees (Applicant) v. Spruce Lodge Home for the Aged (Respondent).

Unit: "all employees of the respondent at Stratford, Ontario regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, and office and clerical staff." (13 employees in the unit).

Number of names of persons on list as originally prepared by employer			13
Number of persons who cast ballots		8	
Number of ballots marked in favour of applicant	7		
Number of ballots marked against applicant	1		

0069-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Chateau Gardens (Oxford) Inc. (Respondent).

Unit: "all employees of the respondent at London, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office staff." (48 employees in the unit).

Number of names of persons on list as originally prepared by employer		49
Number of persons on revised voters' list		46
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	1	

0092-78-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Applicant) v. J. McLeod and Sons Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all plumbers, steamfitters, pipe welders, pipefitters, gas fitters, journeymen and apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in the unit).

Number of names of persons on list as originally prepared by employer		30
Number of persons who cast ballots		30
Number of ballots marked in favour of applicant	17	
Number of ballots marked in favour of intervener	13	

0212-78-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Restfulcare Incorporated (Respondent).

Unit: "all employees of the respondent at Meadow Park Nursing Home at 1210 Southdale Road East, London, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (21 employees in the unit).

Number of names of person on revised voters' list		16
Number of persons who cast ballots		15
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	2	

0214-78-R: The Steele's Wire Springs Employees' Association (Applicant) v. Steele's Wire Springs (1974) Limited (Respondent) v. United Steelworkers of America (Intervener).

Unit: "all employees at the respondent's plant in Guelph, save and except foremen, those above the rank of foreman, office employees, night watchmen and those engaged in supervisory or confidential capacity." (21 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots		17
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener	7	

0224-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Boschman Contracting Limited (Respondent) v. Christian Trades Unions of Canada (Local 6) (Intervener).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		7
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener	1	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1974-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Duron Ontario Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (10 employees).

0175-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Connolly Contractors Limited (Respondent) v. Ontario Provincial Conference I.U.B.A.C. (Intervener). (12 employees).

0270-78-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. Auberges Richelieu International Ltd. (Respondent) v. Hotel and Restaurant Employees Local 743 (Intervener). (54 employees).

0336-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Forto Forming Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener). (4 employees).

0350-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Len Ariss & Co. Ltd. General Contractors (Respondent). (2 employees).

0433-78-R: Retail Clerks Union, Local 409, chartered by the Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Manestic Manor (Respondent). (6 employees).

0473-78-R: Service Employees Union Local 268 affiliated with the SEIU of A.F. of L., C.I.O., C.L.C. (Applicant) v. Thunder Bay Ambulance Services Inc. (Respondent). (4 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1968-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener).

Voting Constituency: "All cement masons and cement masons' apprentices and helpers engaged in cement finishing work on all concrete construction, save and except non-working foremen and those above the rank of non-working foreman in the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa-Carleton." (12 employees).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots	13	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	10	

0159-78-R: Canadian Paperworkers Union (Applicant) v. Ontario-Minnesota Pulp and Paper Company Limited, Kenora Division (Respondent) v. Local 1330 of The United Paperworkers International Union (Intervener).

Unit: "all employees of the respondent at Kenora, Ontario, save and except salaried foremen, superintendents, persons above the rank of salaried foreman and superintendent, watchmen, office staff, technical staff, custodians and persons covered by subsisting collective agreements between the respondent and Canadian Paperworkers Union Local 238, Office and Professional Employees International Union Local 488, International Association of Machinists and Aerospace Workers Lodge 490, International Union of Operating Engineers, Local 940, International Brotherhood of Electrical Workers, Local 559 and United Paperworkers International Union, Local 1330." (559 employees in the unit).

Number of names of persons on list as originally prepared by employer		559
Number of names of persons on revised voters' list	558	
Number of persons who cast ballots	457	
Ballots segregated and not counted	30	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	64	
Number of ballots marked in favour of intervener	361	

0189-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Sealex Waterproof Coatings Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Voting Constituency: "Employees of the respondent engaged in waterproofing and/or restoration work in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman." (10 employees).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots		10
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener #2 Local 298 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada	8	

0208-78-R: Canadian Paperworkers Union (Applicant) v. Abitibi Provincial Paper A Division of Abitibi Forest Products Ltd. (Respondent) v. Local 40 of the United Paperworkers International Union (Intervener).

Unit: "all employees of the respondent at the Thunder Bay Division, Thunder Bay, Ontario, save and except salaried foremen, supervisors, persons above the rank of salaried foreman and supervisor, office and sales staff and persons covered by subsisting collective agreements between the respondent and Canadian Paperworkers Union, Local 239, International Brotherhood of Electrical Workers, Local 1565, International Union of Operating Engineers, Local 865 and Office and Professional Employees International Union, Local 236." (319 employees in the unit).

Number of names of persons on list as originally prepared by employer		320
Number of persons who cast ballots		271
Number of segregated ballots cast by persons whose name appear on voters' list	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	68	
Number of ballots marked in favour of intervener	201	

0210-78-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. York University (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Voting Constituency: "All stationary engineers and those persons engaged as their helpers save and except foremen, persons above the rank of foreman, and office staff." (19 employees).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots		18
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	10	

0225-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. United-Carr, Division of TRW Canada, Limited (Respondent) v. United-Carr Employees' Association (Intervener).

Unit: "all employees of the Respondent at Brantford, save and except foremen and foreladies, persons above the rank of foreman and forelady, office staff, sales staff and Quality Control Staff." (372 employees in the unit).

Number of names of persons on revised voters' list		367
Number of persons who cast ballots		353
Number of ballots marked in favour of applicant	167	
Number of ballots marked in favour of intervener	186	

0312-78-R: International Woodworkers of America (Applicant) v. Mount Forest Casket Limited (Respondent).

Voting Constituency: "All employees of the respondent at Mount Forest, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (40 employees).

Number of names of persons on list as originally prepared by employer		40
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	25	

Certification Dismissed Subsequent to Post-Hearing Vote

1729-76-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lackie Bros. Limited (Respondent) v. Shopmen's Local Union No. 734 of International Association of Bridge, Structural & Ornamental Iron Workers (Intervener).

Unit: "all employees of the respondent at Kitchener, Ontario, save and except foremen, those above the rank of foreman, office staff, engineering trainees, students employed during the school vacation periods and persons covered by subsisting collective agreements." (40 employees in the unit).

Number of persons on revised voters' list		40
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	27	

2206-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Heath Construction Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "Carpenters and Carpenters' apprentices employed by the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	2	
Number of segregated ballots cast by persons whose name appear on voters' list	1	

Ballot Box Sealed

1823-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. ITEA Canada Ltd. (Respondent).

Unit: "all employees of the respondent in the City of Cornwall, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (35 employees in the unit).

Number of names of persons on list as originally prepared by employer		40
Number of names of persons on revised voters' list	37	
Number of persons who cast ballots	36	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	33	

1843-77-R: Optical & Plastic Technicians & Allied Workers Union Local 67 of U.H.C. & M.W.I.U. – C.L.C. (Applicant) v. Bausch & Lomb Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all Ophthalmic Division laboratory employees of Bausch & Lomb Canada Ltd. in its prescription laboratory in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (27 employees in the unit).

Number of persons on revised voters' list		29
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	26	

1886-77-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Local 1451 UAW (Respondent).

Unit: "all employees of the respondent at Kitchener, save and except office staff." (4 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	2	

2027-77-R: United Steelworkers of America (Applicant) v. Revel International Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Barrie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (29 employees in the unit).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	14	

0125-78-R: International Union, United Plant Guard Workers of America, Local No. 1958 (Applicant) v. Diesel Division, General Motors of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all security guards employed by the respondent at its plants in London, Ontario save and except sergeants and persons above the rank of sergeant, office and clerical employees, students em-

played during the school period, persons regularly employed for not more than twenty-four (24) hours per week." (16 employees in the unit).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	18	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	15	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0169-78-R: Canadian Union of Public Employees (Applicant) v. Travelways School Transit (Respondent). (180 Employees).

0356-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Green-spoon Brothers Limited (Respondent). (10 employees).

0360-78-R: Local Union 785, of the United Brotherhood of Carpenters and Joiners of America, formerly, Grand River Valley District Council, on behalf of Local Unions 498, 949, 1940, 2173 (Applicant) v. Dewmat Developments Inc. (Respondent). (15 employees).

0395-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. H M Brooks Ltd. (Respondent). (4 employees).

0396-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rex Forming Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener). (2 employees).

0411-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Fairway Irrigation Limited (Respondent). (4 employees).

0439-78-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. Wandlyn Viscount Motor Hotel (Respondent). (70 employees).

0443-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. (Applicant) v. Concorde Metal Stampings Limited (Respondent). (47 employees).

0485-78-R: Canadian Union of Public Employees (Applicant) v. Walsh's Transportation Company Limited (Respondent). (32 employees).

0540-78-R: Council of Trade Unions (Applicant) v. A & B Paving Co. Ltd. (Respondent). (5 employees).

APPLICATIONS UNDER SECTION 1(4)

0277-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. D. L. Stephens Contracting Niagara Limited and Stephens & Bass Limited (Respondents) v. Christian Labour Association of Canada (Intervener). (2 employers). (*Dismissed*).

1828-77-R: The Toronto Building and Construction Trades Council; International Union of Bricklayers and Allied Craftsmen, Local 2; The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicants) v. Ellwall and Sons Construction Limited, A. & M. Ellis Limited (Respondents) v. The General Contractors Section of the Toronto Construction Association (Intervener). (2 employers). (*Dismissed*).

0050-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Simcoe Plastering & Spray Contractors, Inc., and/or Simcoe Plastering & Spray Contractors, Suburban Lathing and Acoustics Ltd., A.L.C. Interior Systems Inc. and Speed Drywall Limited (Respondents). (*Withdrawn*).

0130-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Eugene Kohn Construction Limited, Betovan Construction Limited and Milestar Limited, carrying on business under the firm name and style of *Richview Terrace* and Eugene Kohn Construction Limited and Betovan Construction Limited, carrying on business under the firm name and style of *Fieldgate Developments* and Betovan Construction Limited, carrying on business under the firm name and style of *Fieldgate Homes* (Respondents). (*Withdrawn*).

APPLICATIONS UNDER THE EMPLOYEES HEALTH & SAFETY ACT

1911-77-U: T.W. Shields (Complainant) v. Commercial Shearing Ltd. (Respondent). (*Dismissed*).

0216-78-U: Jorge Valenzuela (Complainant) v. The Electrolyser Corporation Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1941-77-R: Lawrence Rosenthal (Applicant) v. Local Union No. 353, International Brotherhood of Electrical Workers (Respondent). (2 employees). (*Granted*).

0071-78-R: James Coulson (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 Restoration Steeplejacks (Respondent) v. Blue Chip Building Restoration Limited (Intervener). (*Granted*).

Unit: "all employees of the intervener in the Province of Ontario, save and except those above the rank of working foremen." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	10	
Number of spoiled ballots	1	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	9	

0197-78-R: John Bonnetsmueller (Applicant) v. Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local Union No. 172 (Respondent) v. Neath Toronto Ltd. (Intervener). (13 employees). (*Dismissed*).

0314-78-R: Nottes Supermarket (Applicant) v. Retail Clerks Union Local 409 (Respondent). (3 employees). (*Dismissed*).

0323-78-R: Gerardo Strazzella for himself and on behalf of others (Applicant) v. Local 280 of the International Beverage Dispensers & Bartenders Union of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L., C.I.O., C.L.C. (Respondent). (7 employees). (*Dismissed*).

0379-78-R: Employees of Ellwood Robinson Const. Co. Ltd. (Applicant) v. Operating Engineers Local 793 (Respondent) v. Ellwood Robinson Limited (Intervener). (42 employees). (*Dismissed*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0381-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Holmes Insulations Limited (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1417-77-U: Bro Industrial Development Corporation Limited (Applicant) v. Joe Dominguez, Qunito Ceolin, Labourers' International Union of North America, Local 183, Clive Ballentine and Toronto Building & Construction Trades Council Joe Mirabelli (Respondents). (*Withdrawn*).

0435-78-U: Venice Masonry Contractors Limited (Applicant) v. Toronto Building and Construction Trades Council, Local 46 Plumbers and Pipefitters, Carpenters District Council of Toronto, International Brotherhood of Electrical Workers Local 353, Elevators Constructors Local 50, Labourers International Union Local 183 (Respondents). (*Withdrawn*).

0436-78-U: Venice Masonry Contractors Limited (Applicant) v. Toronto Building and Construction Trades Council, Local 46 Plumbers and Pipefitters, Carpenters District Council of Toronto, International Brotherhood of Electrical Workers Local 353, Elevators Constructors Local 50, Labourers International Union Local 183 (Respondents). (*Withdrawn*).

0452-78-U: Kaiser Aluminum Company Division of Kaiser Aluminum and Chemical of Canada Limited (Applicant) v. Those Persons Named in Schedule "A" and "B" (Respondents). (*Withdrawn*).

0458-78-U: Reed Ltd. Pigments Division (Applicant) v. Those Persons Named in Schedules "A" and "B" (Respondents). (*Withdrawn*).

0476-78-U: The Budd Automotive Company of Canada Limited (Applicant) v. Employees of the Applicant set out in Schedule "A" of the Application (Respondent). (*Withdrawn*).

0556-78-U: Stewart & Hinan Contractors Limited (Applicant) v. United Steelworkers of America, Local 13173, and Mr. Ken Ashton (Respondents). (*Dismissed*).

0568-78-U: Foster Wheeler Ltd. (Applicant) v. James Downie, Charles Langille, Tom Heath, Gerald Sanboe, Elias Maloney et al (See Schedule "A" attached hereto) (Respondent). (*Withdrawn*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0004-78-U: United Steelworkers of America (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent). (*Dismissed*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1217-77-U: International Union of Operating Engineers, Local 793 (Applicant) v. J. & M. Chartrand Realty Limited, Jacques Chartrand, Maurice Chartrand, Real Chartrand, Denis Chartrand and Frank Young (Respondents). (*Withdrawn*).

1587-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. Norfinch Construction (Toronto) Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0630-77-U: Labourers International Union of North America, Local 493 (Complainant) v. Municipality of Casimir, Jennings & Appleby (Respondent).

– and –

0784-77-U: The Regional Municipality of Casimir, Jennings, Appleby (Complainant) v. Labourers International Union of North America, Local 493 (Respondent). (*Dismissed*).

1035-77-U: International Woodworkers of America (Complainant) v. Don Valley Lumber Company Limited A Division of Solmill Building Supplies Limited (Respondent). (*Withdrawn*).

1351-77-U: International Woodworkers of America (Complainant) v. Centaur Temporary Help Limited and Don Valley Lumber Company, A Division of Solmill Buildings Supplies Limited (Respondent). (*Withdrawn*).

1588-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Norfinch Construction (Toronto) Limited (Respondent). (*Withdrawn*).

1830-77-U: Canadian Paperworkers Union (Complainant) v. Kleen-Stik Products Limited (Respondent). (*Granted*).

1858-77-U: Bakery & Confectionery Workers' International Union of America, Local 264 (Complainant) v. Sandra Instant Coffee Company Limited (Respondent). (*Granted*).

1954-77-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks (Respondent). (*Withdrawn*).

1955-77-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks (Respondent). (*Withdrawn*).

1956-77-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks (Respondent). (*Withdrawn*).

1963-77-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks (Respondent). (*Withdrawn*).

1988-77-U: Gail Lambert (Complainant) v. North Halton Association for the Mentally Retarded and R. J. Bilodeau (Respondent). (*Withdrawn*).

0072-78-U: Sharon Bodi (Complainant) v. Queensway General Hospital & Canadian Union of Public Employees (Respondent). (*Withdrawn*).

0242-78-U: A.N. Shaw Restoration Ltd. (Complainant) v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 127 (Respondent). (*Granted*).

0282-78-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks (Respondent). (*Withdrawn*).

0340-78-U: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Cochrane-Dunlop Ltd. (Respondent). (*Withdrawn*).

0348-78-U: Vernon A. Bassue (Complainant) v. Paul Ryan & Local 2900 U.S.W.A. (Respondents). (*Dismissed*).

0358-78-U: The Canadian Union of Public Employees (Complainant) v. Gordon Nelson Development Company Ltd. (Respondent). (*Withdrawn*).

0359-78-U: David Joannis (Complainant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 765, Donald Melvin and Honore Caron (Respondents). (*Withdrawn*).

0374-78-U: Samuel Thomas Smith (Complainant) v. Local 527 Plumbers & Pipefitters U.A. (Respondent). (*Withdrawn*).

0406-78-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Complainant) v. J. McLeod and Sons Limited (Respondent). (*Withdrawn*).

0408-78-U: Hotel and Restaurant Employees and Bartenders International Union, Local 604 (Applicant) v. Dennis Gould carrying on business as Trent Inn Hotel, Coffee Shop and Restaurant (Respondent). (*Withdrawn*).

0409-78-U: Brian Zoskey (Complainant) v. Local 1740 International Association of Machinists and Aerospace Workers & O.K. Canada Ltd. (Respondent). (*Withdrawn*).

0429-78-U: The International Beverage Dispensers' and Bartenders' Union, Local 280 of the Restaurant Employees and Bartenders International Union A.F.L. – C.I.O. – C.L.C. (Complainant) v. Georgian Motor Hotel (Oshawa) Ltd. (Respondent). (*Withdrawn*).

0430-78-U: The International Beverage Dispensers' and Bartenders' Union, Local 280 of the Restaurant Employees and Bartenders International Union A.F.L. – C.I.O. – C.L.C. (Complainant) v. Georgian Motor Hotel (Oshawa) Ltd. (Respondent). (*Withdrawn*).

0440-78-U: Daniel Kearney (Complainant) v. Local 247 Labourer's International Union (Respondent). (*Withdrawn*).

0453-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L. – C.I.O. – C.L.C. (Complainant) v. Cloverleaf Hotel Ltd., Known as: Cloverleaf Hotel (Respondent). (*Withdrawn*).

0454-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L. – C.I.O. – C.L.C. (Complainant) v. Queensbury Inn Enterprises Inc. (Respondent). (*Withdrawn*).

0470-78-U: United Steelworkers of America (Complainant) v. Collegiate Sports (Respondent). (*Withdrawn*).

0489-78-U: Canadian Union of Public Employees and its Local 1744 (Complainant) v. Toronto Western Hospital (Respondent). (*Withdrawn*).

0497-78-U: James Garnet Trudell (Complainant) v. McKinlay Transport (Respondent). (*Withdrawn*).

0498-78-U: James G. Trudell (Complainant) v. Teamsters Union – Local 880 (Respondent). (*Withdrawn*).

0567-78-U: Office & Professional Employees International Union, Local 343 (Complainant) v. Keen Community Credit Union Limited (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

1654-77-M: Hero Werkman (Applicant) v. London and District Service Workers' Union Local 220 (Respondent Trade Union) v. Victoria Hospital Corporation (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0260-78-M: Christie Brown and Company Limited (Bread Division) (Applicant) v. Bakery and Confectionary Workers' Int'l Union of America, Local 264 (Respondent). (*Granted*).

0261-78-M: Christie Brown and Company Limited (Bread Division) (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 55

0803-77-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Durham Metal Industries, a Division of Lambeth Walk Investments Limited (Respondent). (*Withdrawn*).

1827-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Ellwall and Sons Construction Limited, A. & M. Ellis Limited (Respondents). (*Dismissed*).

0138-78-R: Canadian Appliance Manufacturing Co. Limited (Applicant) v. United Steelworkers of America (Respondent #1) v. United Electrical, Radio and Machine Workers of America (UE) (Respondent #2) v. Canadian General Electric Company Limited (Intervener #1) v. Westinghouse Canada Limited (Intervener #2). (*Dismissed*).

0158-78-R: Built-Up Roofers' Damp and Waterproofers' Section of the Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Margven Roofing Limited and M & S Roofing and Sheet Metal Limited (Respondents) v. Toronto Sheet Metal and Air Handling Group Roofing Division (Intervener). (*Withdrawn*).

0288-78-R: The Wood, Wire and Metal Lathers' International Union, Local 562 (Applicant) v. Speed Drywall Limited and Dominion Drywall Contractors (Respondents) v. The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 785 and 2041 (Intervener). (*Withdrawn*).

0393-78-R: The Wood, Wire and Metal Lathers' International Union, Local 562 (Applicant) v. Speed Drywall Limited, Cesaroni Brothers Drywall, Donaldson & Barron Ltd. and Cara Drywall Services (Respondents) v. The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 785 and 2041 (Intervener). (*Withdrawn*).

APPLICATION UNDER SECTION 73(2) (CONTINUATION OF LOCALS UNDER TRUSTEESHIP)

T-97-77: International Chemical Workers' Union v. Canadian Chemical Workers' Union, Local 28 (*Granted*).

APPLICATION UNDER SECTION 76 (FINANCIAL STATEMENT REQUESTED BY TRADE UNION MEMBER)

1960-77-M: Eric Gladish (Complainant) v. ESB Canada Limited and J. Alexander McDonald (Respondents). (*Dismissed*).

JURISDICTIONAL DISPUTES

0051-78-JD: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Complainant) v. Simcoe Plastering & Spray Contractors Inc., and/or Simcoe Plastering & Spray Contractors, Suburban Lathing and Acoustics Ltd., A.L.C. Interior Systems Inc., Speed Drywall Limited, and Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48 (Respondents). (*Withdrawn*).

0160-78-JD: Bricklayers, Masons Independent Union of Canada, Local 1 (Complainant) v. Toronto Building and Construction Trades Council (Respondent). (*Dismissed*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1461-77-M: Sudbury Algoma Sanitorium (Employer) v. Ontario Nurses' Association Local 28 (Trade Union).

1539-77-M: Beacon Hill Lodges of Canada Ltd. (Ottawa Lodge) (Applicant) v. Ontario Nurses' Association (Respondent).

0226-78-M: Corporation of the Town of Renfrew (Applicant) v. C.U.P.E. Local 121 (Respondent). (*Withdrawn*).

0377-78-M: Office & Professional Employees International Union, Local 343 (Applicant) v. Keen (Hamilton) Credit Union Limited (Respondent). (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

1923-77-M: E. & E. Seegmiller et al (Employers) v. Labourers' International Union of North America, Local 1081 (Trade Union). (*Terminated*).

1924-77-M: Steed and Evans Ltd.; E. E. Seegmiller Limited, (Driving Division); Waynco Limited (Employers) v. Teamsters Local Union No. 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Trade Union). (*Terminated*).

1942-77-M: The Labour Bureau of the Ontario Road Builders Association and of the Ontario Sewer and Watermain Contractors Association (Employer) v. T.E.L. Council of Trade Unions (Trade Union). (*Terminated*).

0309-78-M: Matthews Group Limited (Employer) v. Labourers' International Union of North America, Local 1059 (Trade Union). (*Withdrawn*).

0310-78-M: George Wimpey (Canada) Limited (Employer) v. Labourers' International Union of North America, Local 1059 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112A

1586-77-U: Local Union 1788 of the International Brotherhood of Electrical Workers (Applicant) v. Ontario Hydro (Respondent). (*Dismissed*).

1667-77-M: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. P.A. & N. Construction Ltd. (Respondent). (*Withdrawn*).

1909-77-M: Toronto Building and Construction Trades Council, International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicants) v. The General Contractors Section of the Toronto Construction Association, Ellwall and Sons Construction Limited, A & M Ellis Limited and The Masonry Industry Employers Council of Ontario (Respondents). (*Dismissed*).

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1925-77-M: International Union of Elevator Constructors, Local 96 (Applicant) v. Beckett Elevator Company Limited (Respondent). (*Granted*).

0141-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Form Work Association and View Forming Ltd. (Respondents). (*Terminated*).

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REPAC CONSTRUCTION & MATERIALS LIMITED and ONTARIO HAULERS UNION et al.

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1671-77-R United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Alwell Forming Limited**, (Respondent), v. T.E.L. Council of Trade Unions, (Intervener #1), v. International Union of Operating Engineers, Local 793, (Intervener #2).

Certification – Construction Industry – Employee – Discussion of Board criteria for identifying the employer and his employees where a number of companies are present and working closely together on a construction site

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *L. A. MacLean, H. P. Rolph and William Sherman for the applicant; G. Grossman, D. Theaker and R. R. Brock for the respondent; Frank Giles for intervener #1; and P. Gauthier and E. A. Ford for intervener #2.*

DECISION OF THE BOARD; August 31, 1978

1. The applicant has applied for certification with respect to a bargaining unit of “all carpenters and their apprentices, common labourers, equipment operators, save and except non-working foremen and all those above the rank of non-working foreman in the employ of the employer in the geographical District of Kenora (including the Patricia portion), in the Province of Ontario”. The applicant described the respondent as “Matthews Group Limited, Matthews Construction Company Ltd., Matthews Concrete Ltd., Wavell Developments Ltd., Erie Construction Equipment Ltd., Upper Thames Development Ltd., Erie Concrete Products Ltd., Second Upper Thames Development Ltd., Sunrise Developments (London) Ltd. and Alwell Forming Limited”. The applicant also stated in paragraph 10 of its application that the application for certification “is made on the respondent under section 1(4) of The Labour Relations Act of the Province of Ontario (this section is self-explanatory)”.

2. In its reply the Matthews Group Limited adopted the position that it is a member of the Labour Bureau of the Ontario Road Builders Association (the “Bureau”) and of the Ontario Sewer and Watermain Contractors Association and that the Bureau and intervener #1 are parties to a collective agreement which was currently in the process of renegotiation for renewal. Matthews Group Limited also stated in its reply that it was the only company which had been listed to have employees on the job site which was affected by the application and added that in 1968 there was a statutory amalgamation of several companies to form the Matthews Group.

3. In its intervention it was the position of intervener #1 that the bargaining unit described by the applicant was inappropriate because intervener #1 held bargaining rights for employees of Matthews Group Limited in the geographical area affected by this application.

4. It was the position of intervener #2 in its intervention that it had a provincial agreement with Alwell Forming Limited and that intervener #2 was the bargaining agent for equipment operators employed by Alwell Forming Limited in the province of Ontario. Intervener #2 requested the Board to amend the description of the applicant’s proposed bargaining unit to exclude equipment operators.

5. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

6. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.

7. At the hearing it was the applicant's initial view that Matthews Group Limited and Alwell Forming Limited were together the employer of the employees who are affected by this application. The applicant asked that pursuant to section 1(4) these two employers be treated as one employer for the purpose of The Labour Relations Act. The applicant also stated that it was not proceeding with this application in so far as it related to Matthews Construction Company Limited, Matthews Concrete Limited, Wavell Development Limited, Erie Construction Equipment Limited, Upper Thames Development Limited, Erie Concrete Products Limited, Second Upper Thames Development Limited, and Sunrise Developments (London) Limited.

8. Counsel for Matthews Group Limited and Alwell Forming Limited informed the Board that Matthews Construction Company Limited, Matthews Concrete Limited, Wavell Development Limited, Erie Construction Equipment Limited, Upper Thames Development Limited, Erie Concrete Products Limited, Second Upper Thames Development Limited and Sunrise Development (London) Limited had been amalgamated under the name of Matthews Group Limited by letters patent dated January 22, 1968. Counsel produced and filed with the Board a notarial certificate of true copy of these letters patent. It was the position of counsel for Matthews Group Limited and Alwell Forming Limited that the former corporation was the employer of the employees who are affected by this application and not Alwell Forming Limited.

9. Initially the Board heard evidence with respect to the two alleged collective agreements with the interveners. At the conclusion of this evidence the applicant agreed that Alwell Forming Limited and intervener #2 were bound by a collective agreement which covers certain classifications of operating engineers, including operators of forklifts, in the province of Ontario. The applicant also agreed that Matthews Group Limited and intervener #1 were bound by a collective agreement for certain non-supervisory employees, including construction labourers, operating engineers and drivers for various areas of the province of Ontario, including the District of Kenora (Patricia portion included). Having regard to the evidence and representations before it, the Board finds that these two alleged agreements are collective agreements within the meaning of section 1(1)(e) of The Labour Relations Act. The applicant, with the consent of the Board, did not pursue its request for relief pursuant to section 1(4) of The Labour Relations Act and adopted the position that Alwell Forming Limited was the employer of the employees affected by this application. Matthews Group Limited maintained that it and not Alwell Forming Limited was the employer of such employees.

10. The next issue before the Board concerned the identity of the employer of the employees who are affected by this application. Larry Allin testified that initially he was not told who he was working for when he was hired by Ross Gravette. However, Mr. Allin stated that his regular pay cheques had the name of Alwell Forming Limited on them. Upon querying this matter with Mr. Gravette he was told that having two company names was one way of beating the union. Upon the first termination of his employment in Kenora on

December 12, 1977, Mr. Allin received a Record of Employment statement for Unemployment Insurance Canada which indicated that Matthews Group Ltd. was his employer. The statement incorrectly listed his occupation as a crane operator. The witness informed the Board that while the equipment on the site showed the name of Matthews Group, there was no main sign on the project which indicated the name of the employer until after the Board had commenced its hearings. In cross-examination Mr. Allin admitted that he received a form letter from Matthews Group Limited on January 12, 1978, which asked for certain personal information.

11. Frank Cutler gave evidence that he was hired by Claude Boulanger. Although he was not told who was his employer he subsequently received his regular pay cheques which indicated Alwell Forming Limited as the maker thereof. Mr. Cutler informed the Board that he subsequently asked Mr. Boulanger the identity of his employer and was informed that he was working for Alwell Forming Limited and not for the Matthews Group and that this was the reason he was given cheques which were made by Alwell Forming Limited. When the witness was laid off on February 3, 1978, he received a Record of Employment statement for Unemployment Insurance Canada which indicated that Alwell Forming was his employer. The statement incorrectly listed his occupation as a crane operator. In December of 1977 Mr. Cutler received a cheque from Matthews Group for his vacation pay. Mr. Cutler gave evidence that up to and including January 31, 1978, he did not see any sign on the project which referred to Alwell Forming Limited and that for a period prior to January of 1978, a sign on the project indicated that Matthews Group was the contractor for the project.

12. The project manager on the project, Andre Jacques gave evidence that there was no sign on the project and that the pick-up trucks and specifications book at the project had the Matthews Group sign on them. Mr. Jacques testified that he had never worked for Alwell Forming Limited and that the name of Matthews Group Limited appeared on his pay cheques. The witnesses, Richard Brock, Donald Theaker and Richard Cerny each gave evidence of the relationship between Matthews Group Limited and Alwell Forming Limited. Mr. Brock testified that when Matthews Group Limited had forming work which it did not sub-contract, it used cheques from Alwell Forming Limited for costing purposes and that since July of 1975 Alwell Forming Limited has been used for internal purposes only.

13. Mr. Theaker, who is in charge of personnel for the Matthews Group, testified that three employees at the project in Kenora were paid by cheques from Alwell Forming Limited and that this was not the first time that the Matthews Group has used this arrangement. He informed the Board that the reason for using Alwell Forming Limited is an internal costing requirement of the accountant for the Matthews Group. The witness gave evidence that Matthews Group Limited was the employer of all the employees at the project in Kenora and referred to certain documents entitled Authorization of Hiring. However, these documents, for the most part, are either undated or refer to periods of employment which are prior to the relevant period of employment which includes January 31, 1978. The Board notes that none of these documents indicate either that the employee has agreed to work for any particular employer or that the employee has even seen them. Similarly, there was no evidence that Wendell Holmes had seen his termination notice dated February 1, 1978. This document might be interpreted as indicating that Matthews Group Limited rather than Alwell Forming Limited was his employer. Mr. Theaker informed the Board that he had never instructed anyone that employees be hired in the name of Alwell Forming Limited and that

as far as the head office was concerned Matthews Group Limited was the employer of all the employees on the project. In cross-examination the witness agreed that Alwell Forming Limited was still a legal entity and that this company and Matthews Group Limited operate from the same head office. He also agreed that there were inaccuracies in describing Messrs. Allin and Cutler as crane operators. Mr. Theaker agreed that Mr. Allin had received cheques from Alwell Forming Limited and that other employees at the project had also received cheques from Alwell Forming Limited. Mr. Theaker gave evidence that he believed three employees at the project were paid by cheques from Alwell Forming Limited. He stated that either Phil Thormgrimson or Wendell Holmes was one of these three employees. The witness stated that Alwell Forming was not presently regarded as an employer for the purpose of Workmen's Compensation and that the last time that this state of affairs had existed was since 1974 or 1975. Mr. Theaker identified the agreement dated October 21, 1977, with respect to the project between Her Majesty The Queen in right of Ontario as represented by the Ministry of the Environment and the Matthews Group Limited. Section 17 appears in the agreement and states:

**MINISTRY OF THE ENVIRONMENT
STATEMENT "D"
LIST OF PROPOSED SUB-CONTRACTORS**

Section 17 of the Information for Tenderers requires the tenderer to list on this statement sheet the name of each proposed sub-contractor. For the tenderer's convenience and to ensure that a complete list is submitted with the tender, a list of possible sub-trades has been printed below. The tenderer shall make an entry against each possible sub-trade listed either by naming the proposed sub-contractor or by entering "by own forces", whichever applies. No blank spaces are to be left.

If, in addition, the tenderer proposes to sub-let a part of the work which is not listed below, he shall add the sub-trade and the proposed sub-contractor's name to the list.

Failure by a tenderer to comply with the foregoing requirements may result in his tender being disqualified by the Ministry.

Sub-Trade	Proposed Sub-Contractor
Excavation	Matthews Group
Concrete Work	Matthews Group
Mechanical	Ontario Sewage Equipment Services Ltd., Oakville
Electrical	Lake of Woods Electric Ltd., Kenora
Structural Steel & Miscellaneous Metal	Shopst Iron Works Ltd., Winnipeg
Masonry	Dugay Masonry Ltd. Kenora
Precast Concrete	Supercrete Ltd., Winnipeg
Roofing	Midway Roofing Ltd., Winnipeg
Flooring	Matthews Group
Roads	Matthews Group
Landscaping	Matthews Group

Painting & Protective Coatings	Westway Painting Ltd., Toronto
Fencing	Matthews Group
Waterproofing & Dampproofing	Matthews Group
Doors & Hollow Metal Frames	Matthews Group
Finish Hardware	Matthews Group
Sash & Curtain	Matthews Group
Walling	Matthews Group
Instrumentation Supplier	Control & Metering Ltd. for Lake of Woods Electric
Instrumentation Installation	Lake of Woods Electric
Chemical Equipment Supplier	Control & Metering Ltd. Tor. (For Ont. Sew.)
Alum. Doors, Glass & Glazing	Pilkington Glass Ltd.

In re-examination Mr. Theaker testified that Claude Boulanger received a cheque from Alwell Forming Limited and that he was paid with cheques from Alwell Forming Limited or Matthews Group Limited depending on the work which he performed.

14. Mr. Cerny, the general manager of heavy construction for Matthews Group Limited, testified that the employees who were paid by cheques from Alwell Forming Limited were thought to be more suited to concrete work. He informed the Board that he instructed Claude Boulanger that for costing purposes the employees who performed concrete work were to be paid by cheques from Alwell Forming Limited. The witness explained that an employee who was engaged at the project in pipelaying or excavation would be paid with a cheque from Matthews Group Limited and that an employee who was engaged in concrete work would be paid by a cheque from Alwell Forming Limited. Mr. Cerny gave evidence that there was a sign on the site commencing in late October or early November which indicated the name of the contractor and the engineer and that all the equipment had identification which signified the Matthews Group. In cross-examination he agreed that it was possible that for a period all the employees on the project were doing the same work whether they were paid by Alwell Forming Limited or Matthews Group Limited. The witness agreed that Messrs. Allin and Cutler worked as concrete workers and were paid by cheques from Alwell Forming Limited. Mr. Cerny also agreed employees hired by Alwell Forming Limited as concrete workers were paid by Alwell Forming Limited. However, in re-examination Mr. Cerny varied his testimony and gave evidence that Alwell Forming Limited has not had any employees for two or three years.

15. On the one hand there is the explanation that certain employees were paid by cheques issued by Alwell Forming Limited for the purpose of costing the concrete work at the project. On the other hand, there is evidence that Mr. Cutler was hired by Claude Boulanger, who was himself receiving cheques from Alwell Forming Limited, and was told that he was working for Alwell Forming Limited. There is also the statement on the Record of Employment statement for Unemployment Insurance of Mr. Cutler which indicates that Alwell Forming Limited was his employer. This indication which refers to a lay-off after the date of filing of this application is compared with a similar statement with respect to Mr. Allin which is dated several weeks before the date of the filing of this application and which states that Matthews Group Limited was the employer. While the requirements of costing various aspects of a job may require separate payroll accounts either within or without one

company, the evidence before the Board establishes that all of the employees on the project worked on concrete work and that some were paid by cheques from Matthews Group Limited and some were paid by cheques from Alwell Forming Limited. Such evidence, of course, destroys any assertion that the requirements of the accountant for costing purposes were the reasons why certain employees were paid by cheques from Alwell Forming Limited. In addition, this assertion is not consistent with the payment of vacation pay to Mr. Cutler by means of a cheque from Matthews Group Limited.

16. Mr. Boulanger was hired as a working foreman by Mr. Jacques and he supervised the concrete workers. According to the evidence of Mr. Theaker, Mr. Boulanger received cheques from Alwell on the project. It appears to the Board that one employee who was paid by Alwell Forming Limited supervised other employees who were paid by Alwell Forming Limited.

17. The agreement between Her Majesty The Queen in right of Ontario as represented by the Minister of the Environment and the Matthews Group Limited and in particular section 17 thereof has been referred to earlier. Matthews Group Limited has signed this agreement under its corporate seal. Section 17 requires the tenderer (in this case Matthews Group Limited) to make "an entry against each possible sub-trade listed *either by naming the proposed sub-contractor or by entering 'by own forces', whichever applies*. No blank spaces are to be left." (Emphasis supplied.) The concrete work is not to be performed "by own forces" but rather by Matthews Group. It therefore appears that under the agreement Matthews Group Limited is not to perform the concrete work and that an entity within the Matthews Group is to perform such work. It was admitted that Matthews Group Limited and Alwell Forming Limited are under common control or direction within the meaning of section 1(4) of The Labour Relations Act. Alwell Forming Limited, in our view, would certainly fall within the words "Matthews Group".

18. On the evidence before it, the Board finds that Matthews Group Limited had employees on the project in Kenora. The presence of Matthews Group Limited at the project, however, in no way precludes the presence of Alwell Forming Limited and its employees on the project.

19. In the *York Condominium Corporation Number 46 and/or Medhurst Hogg and Associates Limited* case, [1977] OLRB Rep. Oct.645, 648, the Board considered the criteria which it had applied in determining which of two or more parties is or are the employer(s) of certain employees. In that case the Board referred to the following seven criteria: (1) the party exercising direction and control over the employees performing the work, (2) the party bearing the burden of remuneration, (3) the party imposing the discipline, (4) the party hiring the employees, (5) the party with the authority to dismiss the employees, (6) the party who is perceived to be the employer by the employees and (7) the existence of an intention to create the relationship of employer and employee. Mr. Boulanger, who was paid by Alwell Forming Limited, hired Mr. Cutler while Mr. Allin was hired by another person. Alwell Forming Limited had the burden of remuneration. Claude Boulanger was a working foreman who was paid by Alwell Forming Limited and he directed the employees. On the basis of the evidence before the Board it is clear that while the employees who are affected by this application had no clear idea of the identity of their employer at the time they were hired, these same employees were introduced to the name of Alwell Forming Limited when they received their pay cheques. In the absence of any explanation to the contrary, these employ-

ees were entitled to perceive and conclude that their employer was Alwell Forming Limited. Although Mr. Theaker and Mr. Cerny testified that Alwell Forming Limited had not had employees for some years, it is for the Board to determine on the basis of the law and the facts before it whether an employment relationship existed between Alwell Forming Limited and any of the employees at the project. While all of the criteria do not point the same way, the Board is satisfied that the evidence when viewed as a whole supports the conclusion that Alwell Forming Limited on January 31, 1978, employed Larry Allin, Claude Boulanger, Frank Cutler and either Wendell Holmes or Phil Thorgrimson at the project.

18. Before leaving the question of the employment relationship in this application, the Board refers to some remarks which were made more than a decade ago in connection with an application for certification in the construction industry. In the *Clairson Construction Company Limited* case, [1967] OLRB Rep. April 49, 51, the Board stated:

In *Goldlist Construction Limited* (also known as Laurelcrest Investments and Martinway Investments) Board File 12089-66-R, the Board in its decision dated October 6, 1966 said as follows:

Before leaving this aspect of the case we wish to make it clear that the complexities of modern business organization, including new and efficient accounting practices and procedures, do not lessen the necessity of the contractual or consensual element in the employer-employee relationship as described in considerable detail in the *Loblaw Case*. More specifically, a simple book transaction by employer A whereby an employee is transferred to the work force of employer B, or a direction by a foreman of employer A to an employee to report for work on the project of employer B do not by themselves make the employee in question an employee of employer B for the purpose of The Labour Relations Act. Some of the evidence heard in this case leaves us with the distinct impression that, for example, in the case of transfers, the consensual element so necessary in the employer-employee relationship is overlooked or forgotten in the drive to centralize accounting procedures.

Even in a case where the evidence supports an assertion that for costing purposes employees are paid by a cheque issued by one legal entity rather than another legal entity, employers should not lose sight of the fact that in our society an employee is free to dispose of his labour to whomsoever he chooses. The consensual element in an employment relationship ought not to be forgotten. An employee is entitled to know the identity of his employer at the outset of the relationship with an employer. The disclosure of the identity of an employer should not be left to mere chance and speculation upon receiving a first pay cheque. In brief, an employee should be the first, not one of the last, to know the identity of his employer.

19. Having regard to the foregoing, the name of the respondent appearing in the style of cause of this application as the name of the respondent as "Matthews Group Limited, Matthews Construction Company Ltd., Matthews Concrete Ltd., Wavell Developments Ltd., Erie Construction Equipment Ltd., Upper Thames Development Ltd., Erie Concrete Products Ltd., Second Upper Thames Development Ltd., Sunrise Developments (London) Ltd., and Alwell Forming Limited" is amended to read "Alwell Forming Limited".

20. The Board now considers the classifications of the names persons in paragraph nineteen. None of these persons was employed as an equipment operator. In any event, equipment operators who would be employed by Alwell Forming Limited are represented in collective bargaining by intervener #2. The evidence with respect to the work performed by these persons was provided in the testimony of Messrs. Allin, Cutler, Sherman and Jacques. The persons who are under consideration were essentially engaged in concrete work and on January 31, 1978, were engaged in constructing forms. The Board finds that Claude Boulanger was engaged as a carpenter foreman and that Frank Cutler and Larry Allin were employed as carpenters. The Board further finds that Wendell Holmes and Phil Thorgrimson were employed as construction labourers.

21. On the date of the making of this application Alwell Forming Limited had in its employ one carpenter foreman, two carpenters and one or two construction labourers as the only employees who were not already represented in collective bargaining by another trade union.

22. Having regard to the foregoing and to the provisions of section 6(1) of The Labour Relations Act, the Board further finds that all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foremen, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. For the purpose of the count, the list consists of Frank Cutler, Larry Allin, Claude Boulanger and Wendell Holmes and/or Phil Thorgrimson. From the point of view of the count it makes no difference to the applicant's entitlement to certification whether Wendell Holmes or Phil Thorgrimson are included on the list of employees.

24. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on February 14, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. A certificate will issue to the applicant.

0520-78-R Ontario Public Services Employees Union, (Applicant), v. Beechgrove Regional Children's Centre, (Respondent).

Successor Status – Transfer of child care facility from public to private sector – No change in nature of undertaking or employees – Employees formerly excluded from public service unit treated as new hires and an accretion to established private sector bargaining unit – Union bargaining has rights

for new hires after transfer

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W.F. Rutherford and W.H. Wightman.

APPEARANCES: *Chris G. Paliare, Pauline Anidjar, Jim Best and Fred Taylor for the applicant; Joseph Carrier, Evelyn Naldrette and Charles Jeffs for the respondent.*

DECISION OF THE BOARD; August 8, 1978

1. This is an application brought under section 4 of the *Successor Rights on the Transfer of an undertaking to or from the Crown Act 1977*. The application is in respect of the transfer of the children and adolescent unit of the Kingston Psychiatric Hospital, an institution operated by the Crown to an institution known as Beechgrove Regional Children's Centre (hereinafter referred to as Beechgrove) which is governed by a board of directors. Beechgrove commenced to operate on May 1, 1978; the same date as the transfer giving rise to this application. In essence, therefore, there has been a simple transfer of the child care facility from the public to the private sector, where it continued to operate as a new entity known as Beechgrove. The parties are agreed that there was a transfer within the meaning of the Act and further, that there has been no change in the character of the undertaking.

2. 21 persons who were members of the classified service as defined under section 1(b) of the *Ontario Public Service Act* were transferred from the Kingston Psychiatric to Beechgrove effective May 1, 1978. There is agreement that these persons were covered by the scope of the applicant's bargaining rights prior to the transfer. Another 27 persons were also transferred who were members of the unclassified service as defined under Section 1(i) of the *Public Service Act*. The respondent takes the position that those 27 persons were "project employees" falling within the meaning of Section 1(1)(g) of the *Crown Employees Collective Bargaining Act 1977* and did not, therefore, fall within the scope of the applicant's bargaining rights prior to the transfer.

3. Section 1(1)(g) of the *Crown Employees Collective Bargaining Act* provides:

"'employee' means a Crown employee as defined in *The Public Service Act* but does not include,

- (i) a member of the Ontario Provincial Police Force,
- (ii) an employee of a college of applied arts and technology,
- (iii) a person employed in a managerial or confidential capacity,
- (iv) a person who is a member of the architectural, dental, engineering, legal or medical profession entitled to practise in Ontario and employed in a professional capacity,
- (v) a student employed during the student's regular vacation period or on a co-operative educational training program or a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis,

- (vi) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help.
- (vii) a person engaged and employed outside Ontario,
- (viii) a person employed in the office of the Provincial Auditor, or
- (ix) a person employed by or under the Tribunal or the Grievance Settlement Board;"

Section 11 of the Regulations under the *Crown Employees Collective Bargaining Act*, 1972 provides –

“All public servants other than,

- (a) the persons who are not employees within the meaning of clause (g) of subsection (1) of subsection 1 of the Act; and
- (b) the persons in the classifications or positions set out in column 2 of Schedule 2,

are designated as a unit of employees that is an appropriate bargaining unit for collective bargaining purposes under the Act, and the Civil Service Association of Ontario (Inc.) is designated as the employee organization that shall have representation rights in relation to such bargaining unit, upon the day the Act comes into force.”

The applicant is the successor trade union to the Civil Service Association of Ontario Inc. and enjoys the bargaining rights for the comprehensive unit of employees set out above. If, as the respondent claims, the 27 members of the unclassified service who moved to Beechgrove were “project employees” within the meaning of Section 1(1)(g) of the *Crown Employees Collective Bargaining Act*, 1972 prior to the transfer they were excluded from the scope of the applicant’s bargaining rights.

4. The evidence establishes that the 21 members of the classified service who transferred to Beechgrove were extended identical offer(s) of employment to be effective May 1, 1978. These offers of employment provided that as bargaining unit employees the same working conditions, fringe benefits and salary as provided by the Ontario Public Service would be provided with 3 stated exceptions and in addition stated:

“Your service both within the Ontario Public Service and with Beechgrove will be viewed as continuous for continuous service and seniority purposes.”

The members of the classified service were asked to sign a statement either accepting or declining employment on the basis of the terms set out in the offer of employment. They refused and instead signed a statement agreeing to the transfer.

5. The evidence establishes that the members of the unclassified staff who worked in

the children and adolescent unit of Kingston Psychiatric and who moved to Beechgrove were also extended offers of employment. The offers extended to these persons provided in part –

“All employees are on probation during their first twelve months of employment with a review of performance after six months.”

The members of the unclassified staff who moved to Beechgrove effective May 1, 1978 signed statements accepting employment as of that date. It is clear on the evidence that the members of the unclassified staff of Kingston Psychiatric who moved to Beechgrove accepted employment as of May 1, 1978 and were placed on probation for a 12 month period effective as of that date.

6. The parties are agreed that an appropriate bargaining unit at Beechgrove would include both those who transferred from the classified service and those who moved to Beechgrove from the unclassified service. The Board infers from this agreement that both groups are doing similar work under similar terms and conditions of employment. The parties are in dispute as to certain exclusions from such a unit and the Board will remain seized in the event the parties are unable to resolve these issues.

7. The more serious difficulty between the parties arises from the claim of the respondent that the members of the unclassified staff who moved to Beechgrove were “project employees” and not represented by the applicant as distinct from the classified employees who were represented by the applicant prior to the transfer. The respondent takes the position that the mixing of these two groups of employees at Beechgrove (one group represented by the applicant and one group not) creates an intermingling within the meaning of Section 5 of the *Successor Rights (Crown Transfer) Act*, (1977). The respondent likened the *Successor Rights (Crown Transfer) Act* to Section 55 of The Labour Relations Act and referred the Board to re *Bryant Press* case, [1972] OLRB Rep. Apr. 301 in support of the position that the legislation is not designed to allow a trade union to augment or extend its bargaining rights. The respondent asks the Board to exercise its authority under section 8 of the Act and direct the taking of a representation vote.

8. The applicant takes the position that the unclassified employees who moved to Beechgrove were not project employees within the meaning of section 1(1)(g) of the *Crown Employees Collective Bargaining Act* and were, therefore, within the bargaining unit for which the applicant held bargaining rights. The applicant argues that in these circumstances, there was no intermingling and asks the Board to declare it to be the bargaining agent for the appropriate unit of employees at Beechgrove.

9. Section 5(1) of the *Successor Rights (Crown Transfer) Act* 1974 provides:

“5. (1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees em-

ployed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
 - (i) any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings."

10. The Board reads section 5(1) as covering the situation where the employees employed in the undertaking of the Crown (those previously employed in Kingston Psychiatric) are intermingled with employees "employed in one or more *other* undertakings carried on by the employer" (Beechgrove). In this case Beechgrove had no other undertakings at the time of the transfer. Beechgrove commenced to operate as a viable entity on the day the physical transfer of its employees took place. It had no bargaining unit employees prior to May 1, 1978. Assuming but without finding that the members of the unclassified staff who moved to Beechgrove were "project employees" not represented by the union prior to the transfer, it is clear that as of May 1, 1978 they were no longer "project employees" caught by the statutory exclusion. In the context of this application the persons whom the respondent claims were "project employees" of the Crown must be viewed as new hires of Beechgrove as of May 1, 1978. They commenced a probationary period as of that date but otherwise were hired as employees no different than any of the other employees who were transferred to Beechgrove and commenced service on May 1, 1978.

11. The hiring of these persons must be characterized as an accretion to an existing bargaining structure and not as an extension of the union's bargaining rights through the use of the *Successor Rights Crown Transfer Act*. The bargaining rights of any union include the right to represent persons hired into an existing bargaining structure. Growth of a bar-

gaining unit in this manner is referred to as accretion. In the context of a transfer of an undertaking a distinction must be made between the situation where there are pre-existing employees of the successor at some "other undertaking" and the situation where there are none but where persons are hired into the bargaining unit at or after the time of the transfer. In the former situation a trade union has no right to represent the pre-existing employee unless and until the Board declares. An attempt by a union to sweep pre-existing employees under the scope of its representation rights constitutes an attempt to extend bargaining rights rather than to preserve them. (See *re Bryant Press* case (supra). In the latter situation, however, the claim of the union to represent employees hired at or after the transfer constitutes a preservation of its rights. This distinction is consistent with the jurisprudence of this Board under section 55 of The Labour Relations Act and is embodied in Section 5(1) of the *Successor Rights (Crown Transfer) Act 1977* where the legislature has made it clear that intermingling of the type which triggers the jurisdiction of the Board to make the declaration and determinations as set out in Section 5(1)(a), (b), (c) and (d) involves the intermingling of those employed by the Crown immediately before the transfer with those of the successor employed in one or more "other undertaking(s)" of the successor prior to the transfer. The section does not extend to the intermingling of former Crown employees with persons hired at or after the date of the transfer as were those who may formerly have been "project employees." It is useful to contrast the nature of the intermingling in this case with that which was found to exist in *re Owen Sound General and Marine Hospital*, Board Files 1980-77-R and 0036-78-R – as yet unreported – dated May 23, 1978 where Crown employees were intermingled with pre-existing employees of the successor.

12. Assuming but without finding that the members of the unclassified staff who moved to Beechgrove were "project employees" it must be found on the evidence that they were hired into an existing bargaining structure on May 1, 1978 as employees of the successor no different than any of the other bargaining unit employees except for the requirement to serve a probationary period. They were not pre-existing employees of Beechgrove in or at some "other undertaking". Their employment resulted in an accretion to the union's bargaining rights as distinct from an extension of these rights through the application of the successor legislation. The intermingling which took place was not intermingling within the meaning of Section 5(1) of the *Successor Rights (Crown Transfer) Act 1977*.

13. The respondent's representations with respect to a planned build-up of employees must fail for the same reasons as have been set-out above. In a successor situation the bargaining rights of the union are preserved and these rights include the right to represent those hired into the bargaining unit, at or after the transfer has taken place.

14. The Board hereby declares that the applicant trade union represents the employees of the respondent falling within the appropriate bargaining unit and further, that the respondent is bound by the collective agreements which covered the employees (within the meaning of *The Crown Employees Collective Bargaining Act*) of the Crown prior to the transfer. The Board shall remain seized in the event the parties are unable to agree on the proper exclusions from the bargaining unit or in the event the parties are unable to agree on a common expiry date for the agreements which cover the bargaining unit employees.

0857-78-R Canadian Union of Public Employees, (Applicant), v. Campbellford Memorial Hospital, (Respondent).

Certification – Practice & Procedure – No bar imposed where series of unsuccessful applications made over several years

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members J. D. Bell and A. HersHKovitz.

APPEARANCES: *Helen Browne for the applicant; Richard N. Quesnel and Robert Budd for the respondent.*

DECISION OF THE BOARD; August 31, 1978

1. This is an application for certification.
 2. At the hearing in this matter the applicant sought leave of the Board to withdraw its application. The respondent asked the Board to dismiss the application, and having regard to the practice of the Board this application is hereby dismissed.
 3. The respondent company advised the Board that the dismissal of the instant application was the third unsuccessful application brought in respect of essentially the same employees and asked the Board to impose a bar to future applications. Although there is some conflict in the representations it would appear that the unsuccessful applications span a period of six years with the most recent being dismissed in January, 1978 following a vote. Although the Board has in the past imposed a bar after the third unsuccessful application in respect of the same employees it will only do so if the applications have been brought within a relatively short period of time (i.e. a period of a few months). (See re *Patchogue Plymouth Hawkesbury Mills*, [1972] OLRB Rep. July 747, *J.W. Crooks Company*, [1972] OLRB Rep. Feb. 122, *Ken Bunyak's Bus Lines*, [1974] OLRB Rep. Nov. 794 and *Bernardin of Canada Limited*, January 26, 1976, Board File No. 1437-75-R (unreported).) In these situations the Board acts in the knowledge that the employees have had an opportunity to select the trade union as bargaining agent and have failed to do so and concludes on balance that the applicant union should withdraw for some specified period in order to allow the employees to reassess in an atmosphere free from the urgency of an on-going organizing campaign.
 4. In this case the unsuccessful applications span a period of six years with the last one being dismissed over two and one-half years ago. The conditions which will cause the Board to impose a bar after a series of unsuccessful applications do not prevail in this case and accordingly, the Board rejects the request of the respondent employer that such a bar be imposed.
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1708-77-R United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Canac Kitchens Ltd.**, (Respondent), Group of Employees, (Objectors).

Certification – Representation Vote – Eligibility to vote of persons on indefinite layoff or absent due to illness – Employees ineligible to vote where no expectation of recall

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members F. W. Murray and H. Simon.

APPEARANCES: *H. Goldblatt and W. Oliveira for the applicant; W. J. McNaughton and K. Marcus for the respondent; no one appearing for the objectors.*

DECISION OF THE BOARD: August 17, 1978

1. In this matter, a hearing was held for the purpose of hearing representations as to whether or not certain persons were eligible to vote in the representation vote which was ordered by the Board and which took place on March 28, 1978. In ordering the taking of a representation vote, the Board directed that all employees in the bargaining unit on March 6, 1978 (the date agreed upon by the parties) who did not voluntarily terminate their employment or who were not discharged for cause between March 6, 1978 and the date the vote was taken were eligible to vote. The respondent challenged the eligibility to vote of George Nunes and Francisco Galante – the former on the ground that he had been laid off for an indefinite period prior to the agreed upon date, and the latter on the ground that he had voluntarily terminated his employment prior thereto.

2. At the hearing, the parties were agreed upon the following: Nunes was laid off (along with a number of other employees in the bargaining unit) on December 29, 1977. He was not given a recall date. Nunes was recalled on March 13, 1978 and was allowed to cast a segregated ballot. It was not suggested that his layoff was for other than legitimate business reasons or that there was any impropriety on the part of the employer in not recalling Nunes until after the vote was ordered.

3. Galante left the employ of the respondent on February 3, 1978. He left because of a medical problem which necessitated his hospitalization. At the time of his departure, it was not known when he would be able to return to work. At that time, the employer stopped paying OHIP benefits on Galante's behalf and issued to him an Unemployment Insurance Commission slip which shows the reason for issue as illness or injury. Apparently, the respondent considered that Galante had quit. It seems, however, that Galante did not consider his employment to have ended. Apparently, he hoped to return when his health permitted. On March 28th, Galante appeared at the polls and was allowed to cast a segregated ballot. On April 10, after receiving a favourable medical report, Galante contacted the employer for work and was advised that there was none available.

4. In determining the eligibility to vote of a person who is not actually at work (in this case on the date agreed upon by the parties) the Board has regard to the continuance of the employment relationship. In this connection, it is well established that persons on indefinite layoff are not permitted to cast ballots in representation proceedings. As was stated in

Custom Aggregates, [1978] OLRB Rep. March 215, the Board has taken the view that it would be unfair to allow persons whose prospects for continued employment are so uncertain to participate in the selection or rejection of a bargaining agent. Although the absence of a definite recall date is not, by itself, fatal to a person's eligibility to vote, where, as here, there is no evidence to suggest that, on the date agreed upon by the parties, there was an expectation that the employee would be recalled, the Board will conclude that the layoff was for an indefinite period. This conclusion must obtain irrespective of whether the person has in fact been recalled by the date of the vote. One of the purposes of choosing a cut-off date (the date of decision or, as in this case, the date agreed upon by the parties) is to minimize the effect of an attempt to recall or hire employees whose views about representation are known. For the reasons stated, the Board finds that George Nunes was not eligible to vote in the representation vote taken herein.

5. We agree with counsel for the applicant that a person does not lose his eligibility to vote merely by reason of an illness which prevents his attendance at work upon the relevant date. That is not to say, however, that all persons who are ill or injured will be permitted to cast ballots in representation proceedings. As stated, the test for eligibility is the continuance of the employment relationship. In this context, the Board will look to whether the person can reasonably expect to return to work upon completion of his period of convalescence. Where an ill or injured employee is given assurances from the employer that his employment remains secure, such an expectation is entirely reasonable. Where, however, as here, there is no evidence either that the employer had made a commitment to return the employee to work or that it was so obligated, the person will be found not to be an employee for voting purposes. Mr. Galante's situation should be contrasted with the situation which existed in *Alex's Plumbing and Heating Limited* [1970] OLRB Rep. Feb. 1321, where an employee on Workmen's Compensation was found by the Board to be eligible to vote. There, the employer gave evidence that it had not terminated the employee and that when the doctor advised that the employee was fit to return to work, he would be permitted to do so. For the reasons stated, the Board finds that Francisco Galante was not eligible to vote.

6. At the hearing, the Board was advised that the person who cast the remaining segregated ballot is the subject of a section 79 complaint. Accordingly, the final resolution of this matter must await the disposition of that complaint.

0699-78-R Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant), v. **Celtic Construction London Limited**, (Respondent).

Certification – Construction Industry – Membership Evidence – Required money payment not unequivocally evidenced by dues books – Signature of recording secretary rubber stamped – In absence of actual signature and clear statement of account paid evidence rejected.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

DECISION OF THE BOARD; August 3, 1978

1. The applicant filed evidence of membership in the form of five dues books but failed to file a Form 54, Declaration Concerning Membership Documents, Construction Industry.
2. The dues books are signed by the persons who are described as members and are also signed by two persons who are described as president and financial secretary. Within each dues book one double page is set aside for each calendar year. The twelve months of the year are set forth and in adjacent columns there appear corresponding spaces for "Local Dues", "I.U. Dues", "Conf. Dues", "Date Paid", "Month Levied", "Amount Levied", "Month Paid", "Secretary's Signature" and "Ledger Page No.". Each line commencing in January 1978 up to and including May or June or July 1978 bears certain numbers and letters which have been either ink-stamped or written. The page with respect to 1978 does not bear any initials or signatures and does not unequivocally assert that any money payment on account of dues has been made. What purports to be the "Secretary's Signature" is merely an ink-stamped facsimile of a signature and may, of course, be affixed by anyone.
3. The Board is not satisfied that there is unequivocal evidence of the payment of at least one dollar in respect of initiation fees or monthly dues of the applicant. The Board therefore finds that the dues books which have been filed by the applicant are not evidence of membership as contemplated by section 1(1)(j) of The Labour Relations Act. As the Board stated in the *Dor-Kraft Building Materials Limited* case, (1975) OLRB REP. 781, the dues books should *clearly* state the amount paid and should bear the *actual* signature of the person who acknowledges payment on behalf of the applicant. In this regard see also the *Beatty-Hall Construction Co. Limited* case, (Board File No. 0919-76-R, unreported decision dated September 14, 1976).
4. The applicant has failed to file with the Board Form 54, Declaration Concerning Membership Documents, Construction Industry, and also failed to file evidence of membership within the time fixed in accordance with The Labour Relations Act and the Board's Rules of Procedure.
5. The Board is satisfied on the basis of the evidence before it that less than forty-five percent of any employees of the respondent in any bargaining unit that the Board might determine to be appropriate for collective bargaining, at the time the application was made, were members on July 21st, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. Accordingly, this application is dismissed.

0392-78-R United Steelworkers of America, (Applicant), v. **Eastern Steelcasting Division of Sivaco Wire and Nail Company**, (Respondent), v. Labourers' International Union of North America, Local 527, (Intervener).

Certification – Prehearing Vote – Membership Evidence – Board rejecting allegations of im-

propriety concerning membership evidence – Board rejecting only defective membership cards collected in error but in good faith by rank and file employee

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and F.W. Murray.

APPEARANCES: *J. Sack, Brian Shell and Jean Beaudry for the applicant; I.H. McGowan and M. Parent for the respondent; S.B.D. Wahl, F. Manoni and N. Scipioni for the intervener.*

DECISION OF THE BOARD: August 30, 1978

1. This is an application for certification in which the applicant union seeks to displace the intervener union as bargaining agent for all employees of the respondent at its plant in L'Original, Ontario save and except foremen, persons above the rank of foremen, office and clerical staff, sales staff, security guards, quality control inspectors, laboratory technicians, students employed during the school vacation period, persons regularly employed for not more than twenty-four (24) hours per week, and university personnel in training.

2. The applicant sought a pre-hearing representation vote and in a decision dated June 9, 1978 the Board satisfied itself that not less than thirty-five per cent of the employees in the voting constituency appeared to be members of the applicant at the time the application was filed and directed the taking of a pre-hearing representation vote. Indeed the applicant submitted 187 membership cards in respect of the 199 employees in the bargaining unit.

3. The intervener union filed its intervention on May 30, 1978 and alleged that the respondent employer participated in the formation or administration or contributed financial support to the applicant within the meaning of section 12 of the Act, thereby creating a bar to the instant application. The intervener also alleged that persons regarded by the subject employees as being able to affect their employment participated in the formation of the applicant and sought by intimidation and coercion to compel the employees to become members of the applicant and cease to be members of the intervener. The intervener also alleged that persons acting on behalf of the applicant had intimidated a bargaining unit employee by threatening that if he did not sign for the applicant he would have his throat cut. In addition, the intervener alleged that a person signing as a collector had not in fact collected the required \$1 from the person(s) seeking membership and challenged the Form 8 declaration concerning membership documents.

4. During the course of the hearing the intervener withdrew its allegations of employer support for the applicant.

5. At the outset of the hearing counsel for the applicant asked to be supplied with the name of the person acting on behalf of the applicant alleged to have threatened an employee on or about March 15, 1978 by saying to the employee he would have to sign for the applicant and that he should not act on behalf of the intervener or he would have his throat cut. Counsel for the intervener advised that he could not supply the name because the person making the allegation had been so intimidated that he would not reveal the name. While the Board adjourned to consider this matter counsel for the applicant took it upon

himself to approach the prospective witness. He then informed the Board that the prospective witness had informed him that he was not alleging that he had been intimidated or threatened. This information was not disputed by counsel for the intervener. The Board ruled, in accord with the *Statutory Powers and Procedures Act* (R.S.O. 1900) that the intervener must supply the name of the person acting on behalf of the applicant who is alleged to have threatened or intimidated a bargaining unit employee on March 15, 1978 prior to calling evidence in support of its allegation.

6. Counsel for the applicant advised the Board at the outset of the hearing that Jean Pierre Laurin was in fact the collector, the person to whom the employee seeking membership paid the required \$1, in 4 instances where Maurice Bedard signed as collector. He advised further that responsible union officials were not aware of this fact although inquiries were made and thus there is no reference to it on the Form 8.

7. Counsel for the intervener cited the *Emanuel Products Limited* case, [1977] OLRB Rep. Feb. 37 in support of the position that if the collector cannot identify each of the defective membership cards the Board will refuse to give weight to any of the cards submitted by the collector. Counsel for the intervener asked the Board to cover the collector's name on each of the 199 membership cards submitted by the applicant, number the cards, and to then ask Mr. Bedard to identify those cards which he properly signed and the 4 which he did not. Even if we were to accept that the *Emanuel Products Limited* case (supra) stands for the proposition urged by the intervener, and we do not, the Board ruled that it would not be prepared to adopt the procedure urged by the intervener. A person who has acted as collector and signed as such on some 107 membership cards, in a period from 2 to 5 months prior to the hearing cannot possibly be expected to remember the circumstances surrounding the signing of each card let alone separate the cards he witnessed from those witnessed by others without reference to the collector's signature. The evidence tendered through this lengthy procedure would be of no value to the Board and accordingly, the Board ruled at the hearing that it was not prepared to embark upon such a course of inquiry.

8. The intervener called as its first witness Mr. C. Bonin, no relation to Mr. Y. Bonin who signed as collector on 64 cards. The first questions put Mr. C. Bonin were – “Did you sign a card?” and “Did you pay the \$1?” The Board, which is charged under Section 100(1) of the Act with protecting the secrecy of union membership, asked counsel for the intervener the nature of the evidence he was attempting to adduce. Counsel for the intervener replied that he had subpoenaed a number of employees and intended to adduce evidence to establish the identity of the collector in each case which would enable the Board to ascertain if the person shown as collector actually collected the \$1. The Board advised the intervener that if it had specific allegations to make in respect of “non-sign” or “non-pay” that these should be filed with the registrar who would then follow the Board's established practice of assigning a labour relations officer to investigate. The Board will put the matter on for hearing only if a prima facie case is apparent as a result of the officer's investigation. This procedure has been adopted by the Board as a means of protecting the secrecy of trade union membership. The Board advised counsel for the union that if it had specific allegations the established procedure should be followed. The Board then ruled that counsel for the intervener was not permitted to ask employees called to give evidence if they had signed union cards or paid the required \$1.

9. The intervener did not call any further evidence in support of its allegations.

10. Having regard to the admissions of the applicant with respect to the discrepancies which were not listed on the Form 8, the Board conducted its usual inquiry. The evidence established that the applicant's organizing campaign was conducted by Jean Beaudry, a union staff representative for over 25 years. He was approached by Mr. Bedard an employee of the respondent company and met with Mr. Bedard and a group of other employees. A decision was taken to circulate a petition among the employees requesting permission from the Canadian Labour Congress to allow the United Steelworkers Union to organize a unit of employees represented by the Labourers Union. The petition was circulated and forwarded to the Canadian Labour Congress. The evidence does not establish whether permission was granted by the congress. Shortly before the commencement of the open period Mr. Beaudry met with a group of employees and instructed these persons how to sign other employees into membership. His instructions were explicit in respect of the requirement that each employee pay \$1 on his own behalf and that the person receiving the \$1 sign the membership card as collector. Mr. Beaudry signed Messrs. Bedard and Y. Bonin into membership at this meeting in order to demonstrate the correct procedure.

11. The evidence establishes that six persons acted as collectors for the union but that all cards were channeled through Mr. M. Bedard. Mr. Bedard himself signed 107 employees into membership. Mr. Bedard inquired of each of the other collectors (with the exception of Mr. Sauve) if the persons whose names appeared on the cards had actually signed the cards and if they had actually paid the required \$1 on their own behalf. Mr. Bonin made the necessary inquiry of Mr. Sauve and relayed the information to Mr. Bedard. Mr. Beaudry collected the cards from Mr. Bedard and the evidence establishes that he made the necessary inquiries of Mr. Bedard in respect of the cards which Mr. Bedard signed as collector and those received by him from the other collectors. Mr. Bedard testified that in all cases he informed Mr. Beaudry that the cards were in order.

12. In respect of the 4 cards in which he signed as collector but did not collect, Mr. Bedard explained that he received both the cards and the money from Mr. Laurin and made the inquiries of him as to whether the persons whose names were shown on the cards had actually signed and paid the \$1. He testified that at least two of these employees were present when he made these inquiries of Mr. Laurin and that Mr. Laurin answered in the affirmative. He testified that he later discovered that 4 of the 5 cards submitted by Mr. Laurin had not been signed by him. He testified that having made the inquiries of Mr. Laurin he knew that the \$1 had been paid by each of the employees and accordingly, he took it upon himself to sign as collector and testified that he "did not think it could affect anything." Mr. Bedard verified the signature on each of the cards with the employee's signature which was affixed to the petition forwarded to the C.L.C. Mr. Bedard is a rank and file employee who had never been involved in an organizing campaign prior to the campaign resulting in the instant application.

13. The intervener called Mr. John Neysmith, the Personnel and Industrial Relations Manager of Ivaco Rolling Mills, a sister company, for the purpose of establishing that a number of cards submitted without dates were sent back to collectors to be dated. The applicant acknowledged this to be the case as Mr. Beaudry had testified to this fact in his evidence. Accordingly, the Board ruled that the fact which the intervener sought to establish was on the record and the evidence did not have to be called.

14. Mr. L. Ingle, the staff solicitor for the applicant union, signed the Form 8 which

was filed in support of the application. He testified that he phoned Mr. Beaudry on May 29 and asked whether the cards submitted had been signed by the applicant for membership, whether each had paid \$1 on his own behalf and whether the person Who signed as collector had received the money. He testified that Mr. Beaudry answered in the affirmative and did not indicate any exception and accordingly, he signed the Form 8 which was then forwarded to the Board. Mr. Beaudry's evidence establishes that he was contacted by Mr. Ingle and answered the questions asked by Mr. Ingle in the manner indicated by Mr. Ingle in his evidence.

15. The evidence establishes that the cards submitted in support of the application were forwarded by Mr. Beaudry to the union's Toronto office for delivery to the Board. Mr. Ingle did not personally handle the membership cards and did not have the cards before him when he called Mr. Beaudry.

16. Counsel for the intervener advanced three arguments. He argued firstly, that the Board should refuse to give weight to the 107 membership documents which bear the signature of Mr. Bedard as collector. He argued that because Mr. Bedard falsely signed as a collector and reported that everything was in order all his cards should be discounted. He asked the Board not to believe Mr. Bedard's evidence as to which 4 cards were defective and find that the 4 cards could not be identified thereby requiring that all the cards be thrown out. He cited re *Emanuel Products Limited* (supra), *Patchoque Mills* [1972] OLRB Rep. July 747, and *W.H. Vortman Ltd.*, [1975] OLRB Rep. Aug. 605 in support of his arguments. He argued secondly, that in the absence of evidence to establish which cards were re-submitted because they lacked dates or as to what happened to these cards, the Board should discount all of the cards submitted in support of the application. The intervener argued thirdly, that in the face of evidence which establishes that the membership cards were handled by a number of union officials but not by Mr. Ingle, the person who made the Form 8 inquiries and signed the Form 8, the Board must refuse to accept the Form 8 declaration and dismiss the application.

17. The second and third submissions of the intervener warrant only a summary response from the Board. The Board is satisfied that the applicant union took great care in its organizing campaign as is evidenced in part by the fact that cards which lacked dates were sent back for completion to the employee seeking membership. The procedure followed by the applicant in this regard is a proper one and the failure of the applicant to identify which cards were returned is of no consequence. The Board is further satisfied that Mr. Ingle made the necessary inquiries required of a Form 8 declarant and further, that Messrs. Beaudry and Bedard made the necessary inquiries in order to complete the chain of investigation. The fact that Mr. Ingle was not in possession of the cards when he made his inquiries is of no consequence. He made inquiries concerning the membership cards which were submitted in support of this application. The Board is not prepared to assume, as is implicitly requested by the intervener, that there may have been two sets of cards in respect of the 200 employees of the respondent company and that the inquiries made by Mr. Ingle may have been in respect of the wrong cards. The intervener's third submission is rejected.

18. We now turn to the first submission of counsel for the intervener union. This is not a case where a union officer has failed to make the necessary inquiries or has knowingly made a false declaration. This case, therefore, is distinguishable on its facts from the *Emanuel Products Limited* case (supra), and the *W.H. Wortmans Limited* case (supra). The

Patchogue Plymouth Mills case [1972] OLRB Rep. July 747, also relied on by the intervener, deals with the imposition of a bar to future applications in circumstances where an applicant for certification attempts to withdraw its application in the face of evidence indicating that a person shown as collector did not collect the \$1. The Board stated at para. 10 of that decision that if all the allegations against the applicant had been established it would have either dismissed the application or directed the taking of a confirmatory representation vote. This case therefore does not assist the intervener. Where the Board is faced with irregularities in the cards submitted by a rank and file union member, it may reject the defective cards or it may reject all of the cards gathered by that particular collector, while relying on the remainder of the cards, or it may satisfy itself on the evidence that the irregularity was a technical rather than a substantive one and accept all of the membership evidence, without qualification, as it did in the *Puretex Knitting Co. Limited* case [1972] OLRB Rep. June 676.

19. Even if the Board was to reject all of the membership documents which were signed by Mr. Bedard as collector, which is the best the intervener can achieve in the circumstances, the applicant would still enjoy membership support adequate to cause the Board to direct the taking of a representation vote. The Board, however, is satisfied on the evidence that Mr. Bedard, who played an important role in the applicant's campaign, exercised a commendable degree of care in his endeavours on behalf of the applicant. The Board accepts that having made the inquiries which he did of Mr. Laurin he was satisfied that the employees who signed the cards given to him by Mr. Laurin had paid the required \$1 and that his signing as collector "could not affect anything." Although these four cards are defective, the Board is satisfied on the evidence that none of the other cards signed by Mr. Bedard as collector are defective and accordingly the Board accepts these other cards as valid evidence of membership.

20. No statement of objections and desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 45 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of June 9, 1978 in this matter.

21. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

22. A certificate will issue to the applicant.

23. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0483-78-U; 0480-78-U Nairn Centre Sawmill Workers' Union, (Complainant), v. (1) Robert Gordon, (2) Lumber and Sawmill Workers' Union Local 2693, (3) **E. B. Eddy Forest Products Ltd.**, (Respondents).

S-79 – Consent to Prosecute – Interference with Trade Union – Certification – Original certification application dismissed after representation vote – Applicant aware of alleged misconduct at time of original certification but present application filed several months afterwards – Applicant now seeking new vote – Application dismissed

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Wilf Peel and Robert Kennedy for the applicant/complainant; C. Bruce Noble for respondent #1; L. C. Arnold and Tulis Mior for respondent #2; Francis Donnelly and Ross Graham for respondent #3.*

DECISION OF THE BOARD; August 1, 1978

1. Preliminary objections to the hearing of the above two matters were heard concurrently because the statement of material facts supporting the application in each case are identical. The statement of material facts as alleged are set out as follows:

Statement of Alleged Material Facts, Actions and Omissions

1. On Thursday, September 8, 1977 D. Geseron an employee of the E.B. Eddy Forest Products Ltd., Nairn Centre Sawmill went to the Espanola office of Robert Gordon, Northern Affairs Officer with the Ministry of Northern Affairs. D. Geseron asked Robert Gordon for his opinion of the Union situation developing at the Nairn Sawmill. Specifically he asked Robert Gordon if the employee's best interest would be best served by forming their own independent union – the Complainant – or should they remain supporters of the incumbent Lumber & Sawmill Workers' Union, Local 2693.

2. Robert Gordon it turned out was a refugee of the Don Gillis committee for the Steelworkers Union which ultimately dislodged the Mine Mill Workers' Union as the bargaining agent for the Inco employees in Sudbury. He recommended that the Nairn sawmill employees stay with the incumbent Lumber & Sawmill Workers' Union and try to correct any defects in the incumbent union by working for changes from within the incumbent union.

3. He further stated that the Nairn sawmill employees would be putting their jobs on the line if they opted for the new independent union. They would risk losing everything the incumbent union had already bargained for them – in effect, if they chose the new independent union. Their employer could then change and reduce their wages, fringe benefits and working conditions thereby forcing the employees to re-bargain what the incumbent union had already accrued for them. He stated the small union would lack a strike fund and the proper research and other expertise required to bargain their first contract whereas the incumbent union already possessed these requirements.

4. At 4:50 p.m. D. Geseron called Wilf Peel of Job Security Services about his meeting that day with Robert Gordon. It was D. Geseron's impression that based upon Robert Gordon's advice Wilf Peel was seriously jeopardizing the economic futures of the 220 employees at the Nairn sawmill by assisting them to form the Complainant. Wilf Peel denied the allegations during a 43 minute telephone conversation with D. Geseron. Peel and Geseron then agreed to attempt to get together with R. Gordon the next day at 3:30 p.m.

5. Early the next day, September 9th, Wilf Peel arranged to meet Robert Gordon at 3:30 p.m. At the 3:30 p.m. meeting Robert Gordon admitted to formerly being a conciliation officer however he hadn't had anything to do with Labour Relations for 9 years nor did he have a current copy or understanding of the Ontario Labour Relations Act. He believed a union still had to be decertified then the members were in no man's land until the new union was certified. When the implications of Section 5(4) and Sections 70(1) and (2) of the O.L.R.A. were explained and shown to him he still refused to believe there was no jeopardy involved during the changeover period from the incumbent union to the new union. He stated that he found a contradiction between Section 70(1) and Section 70(2). How wonderful that the lawyer in Toronto designed the law so that only Robert Gordon would perceive the contradiction.

6. Robert Gordon maintained his position that the way he would proceed to correct the problems at the Nairn Sawmill would be to work from inside the union. When the incumbent's union constitution Sections 17(B) and 19 (A&B) were shown and explained to him he disputed Wilf Peel's definition of 17(B). He stated 17(B) was only meant to stop a minority from running the union. It was pointed out to him by Wilf Peel that 17(B) could be used to throw members out of the union and then they would be fired by the Company under 5.01(B) of the proposed and existent nairn sawmill collective agreement. He was told of Tuilio Mior's dictatorial tendencies. He stated that he would not be afraid of the constitution – he would take Tuilio Mior on from inside.

7. Robert Gordon questioned the small union's chances of survival outside the Labour Movement. Where would the Complainant get the research and the current economic picture at each negotiations. Wilf Peel stated that he had access to the same research as the big unions and he further had access to research and information that only management had access to. All of these insights, information and research would be made available to the Complainant. Robert Gordon stated the small union had no strike fund. It was pointed out to Robert Gordon that the incumbent union settled for 6 items less than the other sawmills settled for in the last negotiations rather than even threaten a strike and therefore jeopardize their strike fund. Further Big Unions rationalize their strike fund on a per capita basis as far as what each individual group eventually gets from the strike fund – that on that basis the small union could have a similar size strike fund within 2 years. He rejected the argument as too simplistic to be practical.

8. Robert Gordon agreed that regardless of his opinions the final choice was the choice of the Nairn sawmill employees – however this choice must be made very carefully for it could jeopardize their employment. Robert Gordon told D. Geseron that it appeared that Wilf Peel had a lot of good ideas as to how to improve the Labour Movement however the Nairn employees would have to put their jobs on the line like workers did in the 1930's – 1940's and like we did in Sudbury in the 1950's to effect such changes. Wilf Peel disputed this assessment stating the current Ontario Labour Relations Act allowed such a choice without jeopardy. The new union would then face the same risks after certification that any other union faced in its daily struggle. If the risks became too great they could always sign a service contract with a larger union thereby being in a client position outside of the typical union's constitution prison.

9. Robert Gordon also pointed out to Wilf Peel and D. Geseron that he was an "author". He had wrote a book which he predicted would be controversial about his experiences during the Steel-Mine Mill fight in Sudbury. Throughout the meeting he attempted to draw comparisons between the Nairn situation and his heady days in the Steel-Mine Mill Sudbury fight. He stressed the violence, the riot act being read, his forced retreat from the Mine Mill Hall etc. Wilf Peel disputed his analogies with the Nairn situation.

10. The meeting was closed at 4:50 p.m. with Robert Gordon stating he found the Nairn situation very interesting – outside his usual realm of problem solving – his usual problem situation was which street the school bus should go down. The Complainant couldn't agree more that this is his area of expertise and on a future basis he should work only in his areas of strength. It is ludicrous that an Ontario Government employee is loosely throwing out such labour relations opinions based on stale (9 years since) labour experience and no real appreciation or understanding of the current Ontario Labour Relations Act or the situation at the Nairn sawmill. He should have demurred and advised any persons who inquired to see a qualified labour lawyer should they desire another opinion before making their decision.

11. By his actions Robert Gordon interfered with the selection of the Complainant. The only parties that would gain from his actions ultimately is the employer of the members of the Complainant, E.B. Eddy Forest Products Ltd. and his friends in Big Labour. In effect Robert Gordon did a favour for his friends because ultimately D. Geseron did not sign a membership form with the Complainant – how many more Nairn employees did Robert Gordon talk to or influence was unknown. Robert Gordon by his actions did an extreme disservice to the Complainant, the Nairn sawmill employees and the people of this Province of Ontario.

12.A The Complainant has subsequently been made aware that Robert Gordon's opinion of the Complainant, his September 8, 9, 1977 conversations with D. Geseron and W. Peel and his refusal to sign a letter of clarification.

tion was common knowledge amongst the Nairn Sawmill workers before the O.L.R.B. election and was a significant factor in the final election result which was a narrow majority for the incumbent union.

12.B In his capacity as Northern Affairs Officer his opinions given in a Government office were not solely his own but were construed to be the opinions of the Government of Ontario. In his capacity as Northern Affairs Officer his official duties include assisting Espanola area citizens in cutting bureaucratic red tape, solving consumer problems and acting as a source of respected knowledge. For him to use his exalted position by virtue of the nature of his Government job in order to interfere with the selection of a trade union and to propagate his personal opinion is reprehensible, an abusive breach of the public trust in the Civil Service and the Government of Ontario, and a contravention of Section 3 and 56 of the O.L.R.A. on behalf of Respondents #2 and 3.

13. Respondent #3 allowed Respondent #2 to hold a meeting of its membership in the Big Log Mill of its operations at Nairn Centre, Ontario contrary to Sections 56 and 62 of the O.L.R.A. The purpose of the meeting was to urge the Respondent #2 membership to continue to be a member and to agree to and refute a letter written by W. Peel dated July 25, 1977. Mr. Nelson Gillis, Respondent #2's Union Steward accompanied by Antonio Tremblay, a Union Committeeman chaired the meeting. Mr. Morrisette, a foreman for Respondent #3 was aware of the Union meeting and was in the area adjacent to the lunchroom throughout the membership meeting. The meeting took place in the lunchroom on the morning of August 4th from midnite to 12:45 a.m.

14. Respondent #3 further allowed Respondent #2 to hold a meeting of its membership in the Small Log Mill of its operations at Nairn Centre, Ontario contrary to Sections 56 and 62 of the O.L.R.A. The purpose of the meeting was to urge Respondent #2's membership to continue to be a member and to agree to and refute a letter written by W. Peel dated July 25, 1977. Mr. Nelson Gillis, Respondent #2's Union Steward, accompanied by Thomas Gough a Union Committeeman chaired the meeting. Mr. J. Delaney, a foreman for Respondent #3 allowed directly the Union meeting to proceed. The meeting took place in the lunchroom on the morning of August 5th from midnite to 12:30 a.m.

The incidents which occurred in paragraphs 13 & 14 were reported to the Respondent #3's Personnel Manager, B. G. Campbell for remedy on August 26, 1977 at 7:34 a.m.

15. On the afternoon of August 24, 1977 Mr. K. Breit, a Quality Control Supervisor for the Respondent #3 called Mr. Tuilio Mior, President of Respondent #2 to inform him that a new Union had been formed amongst the Respondent #2's members and said Union was signing up members from amongst the applied for bargaining unit employees. Mr. K. Breit made this telephone call from an office in the Planer of Respondent #3's operations.

16. At 9:00 p.m. August 29, 1977 Mr. Gauvin, a Foreman for Respondent #3 escorted Messrs. C. Seguin, Area Representative and F. Miron, Vice President of Respondent #2 to Respondent #3's Small Log Mill area. Mr. Gauvin then allowed Seguin and Miron to roam around the complete Sawmill area unescorted in order to facilitate their convincing the applied for bargaining Unit employees to continue to be members of Respondent #2 contrary to Sections 56 and 62. Seguin and Miron then met with the Small Log Mill employees in the Small Log Mill lunchroom from midnite to 1:00 a.m. August 30, 1977.

The incidents which occurred in paragraphs 15 & 16 were reported to the Respondent #3's Personnel Maanger, B. G. Campbell for remedy on August 30, 1977.

17. Respondent #3 has not allowed fulltime Union Representatives to freely roam about their Nairn operation unescorted in the past. This departure from past procedure clearly indicated to Respondent #3's Nairn employees that Respondent #3 favoured Respondent #2's attempt to continue to represent the applied for bargaining unit employees. This indication supported the statements made by Respondent #2 to Respondent #3's Nairn operation employees that Respondent #3 would never sit down and negotiate a contract with a Union with which W. Peel was associated with – further because of Respondent #3's unfavourable attitude it would take the Complainant at least 2 years to negotiate a new collective agreement. These protracted negotiations of course would involve a lengthy strike according to representatives of Respondent #2. These actions by Respondent #3 and Respondent #2 adversely affected employee support of the Complainant Union.

18. On the afternoon of August 31, 1977 Respondent #3 again (per paragraph 16) allowed Messrs. C. Seguin, Area Representative and F. Miron, Vice President of Respondent #2 to roam the complete sawmill area loosely escorted by R. Graham, Employment Supervisor for Respondent #3. Respondent #3 gave their permission to the two recalcitrants on the pretext they were investigating outstanding grievances.

19. In fact C. Seguin and F. Miron continued to attempt to persuade the applied for bargaining unit employees to continue to be members of Respondent #2. They did this by having D. Kukoraitis convey Respondent #2's falsehoods to the Planer employees. They then continued on to the rest of the sawmill and to the Small Log Mill lunchroom where R. Graham discontinued his escort while they met employees in the lunchroom. While in the lunchroom they continued their attempt to persuade the applied for bargaining unit employees to continue to be members of Respondent #2 by misrepresenting the Ontario Labour Relations Act in a manner which attempted to lead the employees present to believe their future employment security with Respondent #3 would be threatened if they continued to support the Complainant Union, all of which is contrary to Section 56, 61 and 62.

The incidents which occurred in paragraphs 18 & 19 were reported to the Respondent #3's Personnel Manager for remedy at 3:58 p.m., August 31, 1977.

20. As illustrated in paragraphs 13 to 19 Respondents #2 and 3 desperately wanted the Nairn sawmill employees to remain members of Respondent #2. Their goal was one and the same as clearly shown in Paragraph 15. The Complainant will demonstrate that the publicity was such concerning the Complainant's certification attempt that Robert Gordon was aware of same prior to Mr. Geseron's September 8th visit. He admitted this to W. Peel on September 9th (paragraph 5). In the context of the small town of Espanola Mr. Gordon's actions clearly were perpetrated on behalf of his friends at the major employer in town who was on record (local newspaper) as being allegedly against the Complainant's certification. There can be no other reasonable explanation of his actions as a Government representative.

21. By so perpetrating all of the above the Respondents have acted contrary to the Ontario Labour Relations Act by denying the Complainant their rights under the Ontario Labour Relations Act.

2. The Board intends to deal first with the Board File No. 0480-78-U which is an application for consent to prosecute alleging breaches of sections 3, 56, 61 and 62 of The Labour Relations Act. The statement of material facts allege the commission of an offence by the respondent, Gordon, on September 8 and 9, 1977. The statement further alleges certain activities by the respondent union and respondent company during August, 1977 which in themselves are alleged to be a contravention of the Act. The applicant herein argues that the statement of facts establishes a linkage between these two apparently separated incidents. It is not necessary for us to make any finding in respect to the applicant's contention because of the view we take in respect to the impact of the *summary Conviction Act* on this application.

3. In a proceeding such as this it is only incumbent on the applicant to make out a *prima facie* case but even were the Board to find in this instance the applicant had satisfied the onus on him, there remains in the Board an independent discretion to grant or refuse the application as set out in the language of the Board in *Toronto Newspaper Guild v. CCH Canadian Limited* [1974] OLRB p. 375 where it was stated:

"...a discretion which is guided by the course of action it considers best suited to preserve or advance industrial peace, tranquility and order in the circumstances immediately before it and in industrial society at large."

4. Prosecutions for an offence under The Labour Relations Act must proceed under the *Summary Conviction Act* and the applicable sections of the Criminal Code (Canada) where it is provided in section 721(2) that "No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose." The Board has on numerous occasions dismissed as untimely applications for consent to prosecute which were brought after the expiration of this limitation period.

5. The allegations of material facts in the present case fix the dates of commission of alleged offences by the respondent Gordon as September 8, 1977 and September 9, 1977, (see paras 1 and 5 of the applicant's statement) and alleged offences by the remaining two respondents as August 4, 1977, August 5, 1977, August 24, 1977, August 29, 1977, August 31, 1977 (see paras 13, 14, 15, 16, 18 of the applicant's statement). This application was filed on June 7, 1978 and there is no allegation of an offence having been committed within the six month period immediately preceding that date.

6. It is obvious that the Board would not exercise its discretion under such circumstances to give its consent to prosecution where no proceedings could be instituted in the Courts.

7. The Board therefore dismisses the application in Board File No. 0480-78-U.

8. We turn now to Board File No. 0483-78-U, being a complaint laid under section 79 of the Act alleging violation by the respondents of sections 3, 56, 61 and 62, in which the applicant seeks, by way of remedial relief, an order directing the conduct of a new representation vote in the voting constituency now represented by the respondent union and which would offer employees the choice between the applicant union and the respondent union. In order to set this matter in proper perspective, it is necessary that we advert to previous proceedings before this Board.

9. On August 31, 1977 an application for certification (Board File 0883-77-R) was filed by the present applicant seeking to represent those employees of the respondent employer at its Nairn Sawmill as were then (and now) represented by the respondent union. Following the taking of a pre-hearing vote on September 27, 1977, the matter came on for hearing. In that proceeding the applicant had filed with the Board a statement of material facts alleged which were the same as those now included in paragraphs 13 – 17 of the statement filed in this current proceeding, and which were then filed in support of the applicant's request that the Board exercise its discretion under section 7a of the Act to grant an outright certification because the alleged contraventions of the Act were such that the true wishes of the employees were not likely to be revealed by a representation vote. During the course of that hearing, the applicant withdrew its request for relief under section 7a and the allegations on which such request was based were not proceeded with. The Board, by decision of October 27, 1977, directed the opening of the ballot boxes and a counting of the ballots cast on September 27, 1977 and by Board decision dated November 22, 1977 that application was dismissed because less than 50% of the ballots cast were in favour of the applicant.

10. On April 12, 1978 the present applicant filed a complaint under section 79 of the Act alleging a contravention of sections 3 and 56 of The Labour Relations Act and naming Robert Gordon as the respondent and seeking an Order from the Board directing a further representation vote at the Nairn Sawmill, (Board File No. 0098-78-U). On April 12, 1978 the applicant also filed an application for consent to prosecute Robert Gordon (Board File No. 0097-78-U). In both cases the statements of material fact alleged were identical and the allegations are the same as those contained in paragraphs 1 – 12B in the present proceeding. Prior to these matters coming on for hearing, the Board granted leave to withdraw both applications.

11. The present application was filed on June 7, 1978 joining Gordon, the employer and the incumbent union as respondents and the statement of material facts alleged (paras 1 through 12B) are those previously filed in Board Files Nos. 0097-78-U, 0098-78-U and in Board File No. 0883-77-U (paras 13 – 17 only).

12. In respect to the respondent Gordon, counsel makes preliminary objections that the statement of material allegations makes the claim that Gordon was acting in his capacity as a Northern Affairs Officer and that if that be so, then by virtue of the Interpretation Act, The Labour Relations Act does not run against such a person unless specifically stated and The Labour Relations Act does not so state: and that further, the Northern Affairs Act S.O. 1977 section 5(3) specifically precludes an action against Gordon. It is further argued that the relief being sought by the applicant, namely, a new representation vote, has no significance or connection with Gordon, that sections 3 and 62 of the Act do not create an unfair labour practice offence, and that the facts alleged do not on their face disclose a *prima facie* case. For these reasons the Board is urged to dismiss the application insofar as the respondent Gordon is concerned.

13. Board Rule 46(1) provides:

Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

The Board, in recognition that many of the persons coming before it are not professionally skilled in the presentation of pleadings, sets itself against a rigid application of Rule 46(1) which could result in refusing to hear a complaint solely on technical grounds. In cases involving Rule 46(1) the Board must weigh the nature of the defect in pleadings by a person considering himself aggrieved against the right of a person against whom a charge is brought to not be called upon to enter a defence unless there are reasonable grounds that prohibited conduct has been engaged in.

14. The allegations of fact here disclose that an employee Geseron initiated a discussion with Gordon, seeking his opinion of the wisdom of the Nairn Sawmill employees changing their bargaining agent. Gordon gave his opinion and on the following day re-discussed it with Geseron and Peel. Whether or not it was an informed opinion and whether or not it was contrary to opinions held by others is not the issue. The applicant alleges that these discussions were widely known at the time of the representation vote and that only recently has the applicant become aware that they were a significant factor in the vote. However, there is no allegation that Gordon initiated any conversations with other Nairn Sawmill employees and no allegation that he took any step, directly or indirectly, to disseminate information in regard to these discussions. The applicant points to the fact that Gordon's opinions were contrary to the interests of the applicant and therefore beneficial to the respondent union and employer and invites the Board to draw an inference, based on that, that Gordon was therefore acting on behalf of the employer. Without other cogent material facts, which are not here present, we are of the opinion that such an inference cannot be drawn. We can find nothing in the allegations which would support a conclusion that Gordon's opinions were threatening, intimidatory or coercive or that he took any step to impose or and enforce his views on others. Indeed, the applicant's statement in paragraph 8

sets out that "Robert Gordon agreed that regardless of his opinions the final choice was the choice of the Nairn Sawmill employees – however this choice must be made very carefully for it could jeopardize their employment."

15. It is general knowledge that in union organizational campaigns (as in political campaigns) many conflicting views are held and propagated, promises made and consequences of different choices described. In our view the statements allegedly made by Gordon are of that order and, in any event were made in private discussions which Gordon had not initiated, and there is no allegation that Gordon took any step to widen the area of dissemination of his views.

16. Under all of the circumstances we must conclude that the allegations made, even if true, do not reveal any conduct on behalf of the respondent Gordon which is a contravention of The Labour Relations Act and the application insofar as Robert Gordon is concerned is dismissed. Having come to that conclusion it is not necessary for us to deal with the other preliminary objections raised by Gordon's counsel.

17. We turn now to the complaint as it bears against the respondent union and respondent employer. As previously noted the allegations in paras 13 – 17 had been filed with the Board in the certification proceeding: paras 18, 19, 20 and 21 have been filed with the Board for the first time.

18. As we have discussed in dealing with the complaint as it affected Gordon, there is no allegation of fact that Gordon's activities were at the behest of, or on behalf of, or at the solicitation of either the respondent union or the respondent employer. Those allegations cannot therefore be taken to found an action charging the union and employer with responsibility for them solely because in the applicant's view the activities may in some way have enured to the benefit of the respondents.

19. The objections raised by both respondents to the application are that paragraphs 13 – 17 had been previously raised in the certification proceeding and abandoned and should not be permitted to now come forward: that all the facts alleged were in the knowledge of the applicant at the time of the certification proceeding and should have been raised at the hearing, or by way of objection to the conduct of the vote, or by way of reconsideration of that Board decision. It is argued that the remedy being sought, i.e. direction for a new vote, would be indirectly circumventing the Board's certification proceeding. The applicant in reply to these arguments states that, it was only after some dissatisfaction expressed regarding a renewal contract in March of this year that employees in the bargaining unit were willing to come forward and identify their reasons for casting their ballots as they did in the 1977 representation election and that those reasons made evident that the conduct complained of in the application had had widespread effect. The applicant argues that while the application is founded on facts going back to August 1977, that it is only recently that the significance of the results flowing from those facts have become known. Further, the applicant states that the allegations withdrawn at the certification proceedings were only withdrawn because it wanted to shorten the proceedings.

20. Based on the relief which the applicant seeks the Board to grant, namely to direct the holding of a new representation election, it is evident that this proceeding does not stand separate and apart. Even if the Board were to direct a representation election that, in itself,

would be a futile act unless the Board were to use the evidence so gained to either affirm or to revise, revoke, alter or amend its decision of November 22, 1977 in the certification proceeding. The question then becomes whether the applicant through the use of the Board's processes under a section 79 complaint is entitled to, in effect, seek a review or reconsideration of the November 22, 1977 decision.

21. All of the material facts alleged in this application were known to the applicant when the certification proceeding came on for hearing: in fact, those allegations directly bearing on the respondent union and respondent employer were pleaded in the applicant's application (except for the incidents of August 31, 1977 which occurred on the day the application was filed with the Board) to demonstrate a contravention of the Act such as to make it unlikely that the true wishes of the employees would not be made known in a representation vote. The applicant chose not to proceed with those allegations for reasons of its own. By so doing the applicant was, in effect, saying to the Board that it was content for the Board to base its decision on all the evidence then before it, part of which would be the results of the representation election as the applicant well knew. In our opinion the applicant cannot now be heard to say in this proceeding that the evidence, which it elected not to present during the certification hearing, is now to be considered fresh evidence which was not before the Board at the time of its November 22, 1977 decision which should now be considered and which will demonstrate that the election results were invalid. For the Board to countenance such a proceeding, would in our opinion be an abuse of the Board's processes.

22. The applicant argues that while it was aware of the material facts at the time of the certification proceeding it was not aware that, the representation election had been actively influenced by such facts alleged; and that it is only recently that the applicant has gained knowledge from individuals that they were actually influenced by the actions alleged. This argument does not properly represent the Board's evaluation of evidence in situations such as this: it is obviously impossible and unproductive for the Board to embark in an inquiry of individuals as to whether they, in the casting of their ballot, would be or were influenced by one type or another of improper conduct. The only practical and sensible course for the Board to follow is to draw its own conclusions from the objective facts available as to whether it is likely that particular conduct would have the effect of inhibiting a free choice by the average voter. As was said by the Board in *Stauffer-Dobie Manufacturing Co. Ltd.* 59 CLLC 18147.

"In determining the impact on voters of the literature complained of, it is of course obvious that it is rarely, and perhaps never, possible to determine objectively what effect it has actually had. One cannot pay too much attention to either the most gullible voter or the one with firm convictions. One can only look at the circumstances of each case, and on the facts presented, determine whether the statements object to are of such a nature that they are likely to have seriously misled a reasonable voter."

All of the objective facts were known and available to the applicant at the time of the certification hearing from which the Board could have drawn whatever inferences would have been appropriate had these facts been then placed before the Board.

23. For these reasons the Board will not entertain the present application. The Board's procedures are such that a party to a certification has ample opportunity to bring forward relevant evidence both at the initial hearing and subsequently in respect to misconduct relating to the conduct of an election. There is also ample opportunity for a party to seek a review of a Board decision under circumstances such that new evidence comes to light following the hearing which could not reasonably have been previously discovered and which is likely to be conclusive. For the Board to permit the integrity and efficacy of such procedures to be nullified through the use of some other process of the Board would militate against any finality of decision and against stability in labour relations. The Act, itself, recognizes and prescribes certain times at which employees shall have the right to change or terminate their bargaining representatives and further provides the machinery for implementing such a right. Significantly, the Act also provides by implication that outside of these specified periods there shall be periods of stability in which collective bargaining can effectively function.

24. The application is dismissed insofar as it concerns the respondent union and respondent employer.

0725-78-U United Garment Workers of America, (Complainant), v Four B Manufacturing Limited, (Respondent).

S-79 – Duty to Bargain in Good Faith – Practice and Procedure – Board certificate sustained on judicial review by Divisional Court and Court of Appeal – Employer required to bargain notwithstanding appeal to Supreme Court of Canada – Board declining to adjourn bargaining complaint pending final appeal

BEFORE: Donald D. Carter, Chairman, and Board Members O. Hodges and W.H. Wightman.

APPEARANCES: *André Bekerman for the complainant, J.T. Beamish for the respondent.*

DECISION OF THE BOARD; August 15, 1978

1. This is a complaint under Section 79 of the *Labour Relations Act* alleging violations of sections 14, 56, 58, 59(1), and 70(1) of the Act. The thrust of the complaint is that the respondent has failed to meet and bargain with the complainant.

2. The respondent disputed the jurisdiction of the Board to deal with this matter. Previous Board proceedings in respect of the same parties have been before the Courts for some time, the issue being whether a manufacturing operation located upon an Indian reserve is subject to provincial labour relations jurisdiction. In a decision dated June 29, 1977, a majority of the Ontario Divisional Court upheld the Board's determination that the *Labour Relations Act* applied to the respondent. The majority decision of the Divisional Court was subsequently upheld by the Ontario Court of Appeal in a decision dated June 28, 1978. Counsel for the respondent, however, informed the Board that the respondent is now

seeking leave to appeal to the Supreme Court of Canada and that the application for leave is scheduled to be heard in October. The position of counsel for the respondent was that the Board should adjourn its proceedings so long as proceedings are pending before the Supreme Court of Canada.

3. This is not the first occasion when the Board has been faced with the question of whether to proceed in the face of an application for judicial review. The Board's practice has been to determine in the circumstances of each particular case whether the balance of convenience dictates whether it should proceed to hear a matter or wait until the jurisdictional issue has been resolved by the Courts. Such an approach has received judicial approval in *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183* (1971), 71 CLLC ¶14, 087 (Ont.C.A.).

4. In this particular case counsel for the respondent simply asserted the proposition that the pending Court proceedings required the Board to hold this complaint in abeyance. No arguments were submitted by counsel as to how the respondent might be prejudiced if the hearing were to proceed. The complainant, on the other hand, argued that employee support for it would be lost if these proceedings were to await the ultimate resolution of the jurisdictional issue by the Courts. Moreover, the complainant conceded that if the Courts were to find ultimately that the Board was without jurisdiction, then any bargaining that might flow from any remedial order granted in these proceedings would then have no independent legal force.

5. It is the Board's ruling that, in these circumstances, it should proceed to hear the complaint. In reaching this ruling the Board has taken into account the fluidity of the labour relations process, recognizing that in the labour relations context it is simply not possible to maintain a situation in a static state for any length of time. While it could be argued that the respondent might suffer some added expense and inconvenience if this matter proceeds and the Court then finds that the Board is without jurisdiction, it must be recognized that the complainant will be seriously prejudiced if we do not proceed and then our jurisdiction is subsequently upheld. Employees will not, and should not, wait indefinitely for the collective bargaining process to begin. The immediacy of the collective bargaining process is expressly recognized by section 51 of the Act, providing for termination of bargaining rights where there has been a failure by a trade union to give notice to bargain, or for a failure to follow through with bargaining. The Board has also taken into account the fact that our jurisdiction over the respondent has been confirmed at two judicial levels. While the jurisdictional issue has not been ultimately resolved, it cannot be said that this is a case where the Board is patently without jurisdiction to proceed. In these circumstances, the Board considers that the balance of convenience dictates that we proceed to hear the complaint.

6. The evidence indicated that the complainant first gave the respondent written notice of its desire to bargain on February 11, 1977, following the Board's decision to certify the complaint on January 27, 1977. During that February, André Bekerman, an international representative of the complainant union, also contacted Carl Brant, an official of the respondent, and requested a meeting. Apparently, Brant's response was to refer Bekerman to the respondent's solicitor. It would appear that an agreement was later reached between the solicitors for complainant and respondent to the effect that negotiations would be postponed until the Divisional Court had dealt with the application for judicial review.

7. Following the decision of the Divisional Court upholding the Board's jurisdiction, the complainant once again wrote to the respondent giving notice to bargain. This registered letter was refused by the respondent and returned to the complainant by the Post Office. Bekerman then approached the respondent's solicitor who expressed concern that the negotiations might prejudice his client's position. To meet this concern, Bekerman made it clear that the union would withdraw from collective bargaining if the Court were to find that the Board was without jurisdiction in issuing the certificate. Although the solicitor agreed to take this proposal to the respondent, no reply to this proposal was received from the respondent or its solicitor. On January 23, 1978, Bekerman wrote to the solicitor for the respondent repeating the request to bargain, and indicating that it was willing to bargain on the basis that its bargaining rights depended solely upon the validity of the Board's certificate. There was no reply to this letter. Bekerman also testified that, because of the lack of progress in bargaining, it was necessary for him to hold four meetings with the respondent's employees in order to explain the delays.

8. The complainant argued that the complete failure to meet with the union amounted to a violation of section 14 of the Act. The remedy sought by the complainant was a Board order directing the respondent and its official, Carl Brant, to meet with the complainant at a specific time and place, and to commence to bargain in good faith. As well, the complainant sought to recover damages for the additional expenses incurred by the union as the result of the failure to meet and bargain. In reply the respondent argued that, given the jurisdictional uncertainty, it was not unreasonable for the respondent to refuse to meet and bargain.

9. There is no doubt that there has been a clear refusal by the respondent to meet and bargain with the complainant. Can this refusal be justified in any way by the proceedings that are still pending in the Courts? The initial refusal to meet and bargain must be considered in the light of the subsequent agreement of counsel to postpone negotiations until a decision was rendered by the Divisional Court. Given this agreement to postpone negotiations, we are not prepared to characterize the initial refusal to meet and bargain as a failure to bargain in good faith.

10. The continued refusal of the respondent to meet with the complainant following the decision of the Divisional Court assumes a much different cast. At that point the complainant had renewed notice of its desire to bargain, and had made it clear to the respondent that it would not take the position that these negotiations created any bargaining rights separate and distinct from those flowing from the certificate. The response of the respondent was to completely ignore these overtures.

11. Certification by the Board entitles a trade union to serve an employer with written notice of its desire to bargain for a collective agreement. Once this notice is given the employer is required to bargain in good faith and make every reasonable effort to make a collective agreement. These rights and obligations continue to exist even where proceedings challenging the Board's jurisdiction to issue the certificate are still pending before the Courts. While it may be open to the Courts to suspend the effect of the certificate pending the final resolution of the matter, until such action is taken by the Courts the obligation to bargain in good faith applies with full force. This requirement to bargain in good faith where judicial proceedings are pending does not mean that the parties are foreclosed from discussing at bargaining the possibility that the certification might be set aside, and, if an

agreement is reached providing for that eventuality in the agreement. What the law requires is simply that the parties meet and bargain in good faith.

12. The conduct of the respondent following the decision of the Divisional Court establishes that it has not even attempted to meet this obligation. There has been a clear violation of section 14 by the respondent requiring the Board to fashion the appropriate remedial response. The complainant requested that we issue a bargaining order that would dictate the time and place of bargaining and, as well, the participants at the bargaining table. While realizing the need to impress upon the respondent the seriousness of the obligation to bargain, the Board is concerned that the form of order requested by the complainant might require it to assume the role of actively supervising the bargaining. In the Board's view, a less detailed order would be as effective as the order requested by the complainant, and less likely to require close supervision by the Board. Accordingly, the Board orders that the respondent, represented by Carl Brant or some other official with full authority to bargain on its behalf, meet with the complainant forthwith to bargain in good faith, and make every reasonable effort to make a collective agreement.

13. The Board also considered the complainant's request for damages. Given that there may have been some uncertainty about whether the duty to bargain in good faith continued to apply in the fact of this type of application for judicial review, the Board does not consider that this is an appropriate case to consider whether damages might be awarded. The respondent should be warned, however, that the Board will consider any claim for damages that might arise out of any future failure to bargain in good faith by the respondent.

1555-77-M, 1652-77-M; 1653-77-M Bienze Vanderzwaag; Andries Van Es; Arie Van Es (Applicants) v United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., Local 487, (Respondent Trade Union) v **General Concrete Ltd. Hamilton Division**, (Respondent Employer).

Religious Objectors – Collective agreement prohibiting subcontracting to persons not union members – Employees of independent contractor seeking religious exemption from union membership – Exemption not available to employees of employer who is not party to agreement containing union security provision.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *Gerald Vandezande appearing for the applicants; Paul Cavalluzzo and Eric Batton appearing for the respondent trade union.*

DECISION OF THE BOARD: August 28, 1978

1. These proceedings are hereby consolidated pursuant to the Board's Rules of Procedure.

2. These are three applications brought under section 39 of The Labour Relations Act wherein the applicants request exemption from an obligation to join and pay dues to the respondent trade union ("the union") because of their religious convictions or beliefs. Section 39 states as follows:

"39. - (1) Where the Board is satisfied that an employee because of his religious conviction or belief,

- (a) objects to joining a trade union; or
- (b) objects to the paying of dues or other assessments to a trade union, the Board may order that the provisions of a collective agreement of the type mentioned in clause a of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the Income Tax Act (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

(a) subject to clause b, to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with that employer and only during the life of such collective agreement; and

(b) where a collective agreement in force before the 15th day of February 1971 contains the provisions mentioned in subsection 1, to employees in the employ of the employer on the 15th day of February, 1971 and only during the life of such collective agreement,

and does not apply to employees whose employment commences after the entering into of the collective agreement when clause a applies, or on or after the 15th day of February, 1971, when clause b applies."

3. The respondent employer ("the Company") is a manufacturer of concrete blocks. Historically the company has used both truck drivers in its own employ as well as the services of independent contractors to haul the finished blocks. The applicant Mr. Andries Van Es ("Mr. Van Es Sr.") is such an independent contractor. Mr. Van Es Sr. owns three trucks, one of which he drives himself. The other two trucks are regularly driven by the other two applicants. It is agreed that the other two applicants, one of whom is his son, are both employees of Mr. Van Es Sr.

4. Mr. Van Es Sr. began hauling blocks for the company about eight years ago. No date was given to the Board as to when the other two applicants commenced working for Mr. Van Es Sr., but it appears to have been sometime prior to the entering into of the most recent collective agreement between the company and the union.

5. The union was certified to represent certain employees of the company's Hamilton Division in December of 1970. Subsequent to that time a series of collective agreements were entered into between the company and the union all of which contained a form of "union security" clause.

6. The most recent collective agreement between the company and the union was entered into on June 10, 1977. For the first time this agreement contained an article relating to owner-operators. The article, article 23, appears to deal primarily with dependant contractors, that is with persons who pursuant to the 1975 amendments to the Act are now included in the definition of "employee". At the end of the article, however, is to be found the following note:

"NOTE. The parties agree that 'owner-operators' who supply vehicles, whether they have been held to be employees or not, shall join the Union and pay dues in accordance with the memorandum. This shall include all regular drivers".

It is the requirement contained in this note which led to the filing of these three applications. The applications were made during the term of the June 10, 1977 collective agreement.

7. The position taken by the union is that the note to Article 23 is sufficiently broad so as to require independent contractors and employees of independent contractors who haul blocks for the company to join and pay dues to the union. Since the interpretation to be placed on the note was not fully argued by the parties and since in any event the interpretation to be given to the note is more properly a matter for a board of arbitration to determine, we expressly make no finding with respect to this point. However, for the purposes of this application we will assume that the scope of the note is in fact broad enough to affect Mr. Van Es Sr. as well as both of his employees.

8. In considering the three applications it is apparent that Mr. Van Es Sr. falls into somewhat of a separate category from the other two applicants in that he is not an employee within the meaning of the Act. He is instead an employer who derives income from the employment of others. Section 39 of the Act is quite specific in stipulating that the Board can grant a religious exemption under the section only to employees. It follows from this that Mr. Van Es Sr. is not entitled to file an application under the section. In reaching this conclusion, however, we should not be interpreted as adopting the position that the union is in fact entitled to seek to require Mr. Van Es Sr., an employer, to join and pay dues to the union. In this regard see: *International Brotherhood of Teamsters v. Therien* (1959) 22 D.L.R. (2d) 2 (S.C.C.).

9. With respect to the other two applicants there is no question but that they are employees within the meaning of the Act. They are, however, not employees of the company which is the employer party to the collective agreement, but rather of Mr. Van Es Sr. It was

strongly contended by Mr. Vandezande that the fact that they are employees entitles them to bring an application for relief under section 39(1). Because of the wording of the Act we are unable to agree with this submission. While it is true that sub-section 1 of section 39 does not specifically state that it is limited to employees of the employer party to the collective agreement under consideration, nevertheless sub-section 2 of the same section is very explicit in stipulating that subsection 1 applies "to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with *that* employer". Since neither Mr. Arie Van Es nor Mr. Vanderzwaag are employees of the employer who entered into the collective agreement, it would appear that subsection 1 does not apply to them.

10. The effect of our conclusion does not escape us. It appears that where a collective agreement for the first time requires union membership as a condition of employment with the employer who is party to the agreement, an employee of that employer is entitled to apply to the Board to be exempted from the requirement on the basis of his religious convictions or belief. However, where it is claimed that an employee who works for a sub-contractor of an employer party to a collective agreement is required by the terms of the agreement to join a union he is not entitled to apply to the Board for a similar exemption. If this apparent inconsistency is to be altered, however, it can only be through the action of the Legislature. As the Court of Appeal pointed out in *Re Shopmen's Local Union No. 743 of the Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers and Brayshaw Steel Ltd. and United Steelworkers of America* (1970), 26 D.L.R. (3d) 153 the Board has no inherent jurisdiction to apply principles of equity but instead derives its authority solely from the terms of the Act.

11. These three applications are hereby dismissed on the grounds that the applicants are not entitled to relief under section 39 of the Act.

0737-78-U G.M. Gest Limited, (Applicant), v Labourers' International Union of North America, Local 527 and F. Manoni, B. Carrozzi, J-P Cyr, G. Landry, G. LeBlanc, G. Bertholt, J-G Parent, N. Blais, (Respondents).

S-123 – Strike – Collective Agreement – Union official executing agreement with apparent authority to do so – Agreement submitted to A.I.B., approved and fully implemented – Authority to sign agreement on behalf of some locals questioned two years later – Board finding actual authority or notification by conduct so as to estop locals from now denying agreement – Strike illegal

BEFORE: G. Gail Brent, Vice-Chairman.

APPEARANCES: *Joseph Carrier, Len Terry and Lon Mullin for the applicant; Maurice A. Green and Frank Manoni and Bernardo Carozzi for the respondents.*

DECISION OF THE BOARD; August 11, 1978

1. The applicant has applied for relief under section 123 of the Act and has com-

plained that the respondents were engaged in an illegal strike against the applicant beginning on Monday, July 17, 1978 and continuing up to the date of the hearing.

2. The respondent submitted, by way of preliminary objection, that the Board had no jurisdiction to consider the matter because, if there is a collective agreement, it is between the Utility Contractors Association (Association) and the Ontario Provincial District Council of the Labourers' International Union of North America, representing the following affiliated local unions: Labourers' International Union of North America, Locals 183, 247, 491, 493, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089 (Council), and the applicant's only remedy was through the Association. After hearing the submissions of the parties, the Board informed the parties that it was of the view that the applicant was "an interested person" within the meaning of section 123. The applicant in this case is the person against whom the strike action has been taken and the employer of some of the respondents. The phrase "interested person" precedes the list of specific people who may apply and is therefore not narrowed by the enumerated classifications. Surely, the employer who is directly affected by the action is "an interested person" within the plain meaning of those words.

3. On July 31, 1978 the Board informed the parties of its decision in the matter. Essentially, the Board declared that there was an illegal strike by the respondents against the applicant and that it would retain jurisdiction to issue an appropriate order if the employees did not return to work voluntarily. What follows herein are the reasons for that decision.

4. The respondents admitted that there was a strike in progress against the applicant as alleged in the application and that the only issue in dispute was whether or not there had been a collective agreement which bound the parties.

5. The evidence placed before the Board was that the applicant had not been a member of the Association between 1973 and 1976 but had rejoined the Association prior to the 1976 negotiations. In 1973 the applicant had entered into a collective agreement with the Council (Exhibit #8) which was signed by Mr. Stefanini apparently on behalf of the Council. There was also a collective agreement between the Association and the Council during that period (Exhibit #16 and Exhibit #17) which was signed by Mr. Mancinelli on behalf of Council. A "no board report" was issued in 1976 to the Association and the Council.

6. What purports to be a collective agreement between the Association and the Council was executed in August, 1976 (Exhibit #4). The execution purports to be on behalf of the Association and the Council and Mr. Stefanini alone signed for the Council. Prior to the preparation and execution of this document there were two memoranda of agreement (Exhibit #1 and Exhibits #2 and #5) which purport to settle various matters in different regions of the province. Exhibit #1 was signed by Mr. Stefanini on behalf of Local 183 and Exhibits #2 and #5 were signed by an officer of the Council and by an officer of Local 527. Both of these documents were executed subject to ratification, and both were subsequently ratified by the locals involved. At the time Exhibits #2 and #5 were signed Local 527 was on strike and there was a return to work after the terms were accepted. Exhibits #2 and #5 resulted from negotiations carried on in Ottawa between the Association and representatives of the Council and Local 527.

7. The Board is satisfied that Exhibits #2 and #5 are identical in all material respects and that the alleged collective agreement (Exhibit #4) was drawn up after the negotiations which led to Exhibits #2 and #5. Further, it would appear that the rates negotiated were incorporated into Exhibit #4 even though it is not obvious on the face of that document.

8. On the date of the execution of the purported collective agreement only Mr. Stefanini signed at the place for signature on behalf of the Council. The evidence was to the effect that Mr. Stefanini was known to have authority to sign on behalf of Local 183, which has a separate recognition clause, although it was not known whether he had authority to bind Council it was assumed that he might have had this power. No questions concerning the authority of Mr. Stefanini or the existence of a collective agreement were raised by the Association until negotiations for a new collective agreement began in 1978. (These negotiations are continuing and there has been no application for conciliation). Had these doubts been expressed in 1976, the Association could not now be heard to say there was an agreement.

9. There was no evidence that the purported collective agreement had ever been formally ratified by the Council, and the Board accepts the evidence of Mr. Manoni that to his knowledge the purported collective agreement was never placed before Council and that he was not aware of the specific contents of that document. The Board further accepts that Mr. Manoni and others made repeated attempts to have the officers of Council produce the collective agreement for approval by members of Council.

10. The purported collective agreement was submitted to the Anti-Inflation Board and the wage increases as approved were implemented. The applicant also implemented the changes concerning O.H.I.P. payments and union dues and welfare plan payments. The payroll slips submitted in evidence show deductions for union dues and, in the absence of evidence that no dues were remitted, it can be concluded that dues were collected and remitted to the respondent union.

11. Although there is evidence that Mr. Stefanini lacked the actual authority to bind Council, it is a probable inference that he did have authority. There is evidence, as outlined above, that Mr. Stefanini alone executed a prior collective agreement between the applicant and Council and there is evidence that the agreement (Exhibit #4) was implemented and that dues were deducted and remitted to the union over the two year period covered by the agreement. This would tend to reinforce the view that Mr. Stefanini had authority to bind Council.

12. The situation here is that two years passed during which the terms of the purported collective agreement were implemented and dues were remitted to the respondent union. There is no real evidence that the applicant here did not comply with the terms of the agreement as set out in Exhibit #4. There is no justification for accepting dues in the absence of a collective agreement.

13. The evidence shows that prior to the execution of Exhibit #4 outstanding issues had been resolved and on the basis of that resolution there was a return to work by the members of the respondent union. The resolution of those issues followed by the execution of a document which incorporates negotiated changes would seem to indicate that the par-

ties had reached a final resolution of their differences. While there is no evidence that the Council formally ratified the agreement, the respondent did allow the applicant to remit dues and welfare payments over the course of two years and generally allowed a situation to come into being where the applicant and Association could reasonably assume either that Mr. Stefanini possessed the authority to bind Council, or that Council had clothed him with authority after the fact by ratifying his actions; and also that Council had in fact ratified the collective agreement, as evidenced by Exhibit #4, by its conduct. This is the sort of situation where the Board should give weight to the evidence which would tend to establish that the respondent is estopped from denying the existence of a collective agreement.

14. For all the above reasons the Board finds that a collective agreement as evidenced by Exhibit #4 was in existence at all material times and, in view of this and the admissions of the parties, accordingly that the strike which commenced on July 17, 1978 is illegal. Counsel for the respondent assured the Board that the respondent was acting in the bona fide belief that no collective agreement was in existence and that if the Board were to declare otherwise, the respondent would ensure that there would be a return to work forthwith. The Board can appreciate that the matter before it arises out of a very confused state of affairs in the dealings both with Council and also between the Association and the Council. In view of this the Board endorsed the record as follows:

For reasons to follow the Board declares that the strike engaged in by the named respondents is unlawful. In the event that the parties do not return to work forthwith the Board retains jurisdiction to make such further order by way of cease and desist direction or otherwise as it considers appropriate.

0594-78-R International Brotherhood of Electrical Workers, Local 636, (Applicant), v. **The Regional Municipality of Halton**, (Respondent), v. Ontario Public Service Employees Union, (Intervener).

Successor Status – Transfer of facility to private sector and consolidation with much larger entity – On agreement of parties Board maintained a single private sector unit – Intermingled employees formerly represented by Intervener – No representation vote ordered – Prior private sector agreement continued.

BEFORE: G. Gail Brent, Vice-Chairman and Board Members J.D. Bell and W.F. Rutherford.

APPEARANCES: *S.B.D. Wahl and D. Butler for the applicant; Dennis Y. Perlin and Dennis Camm for the respondent; James Best and Andrew Sabourin for the intervener.*

DECISION OF THE BOARD; August 24, 1978

1. The parties in this matter are agreed that the application in this matter should be framed under *The Successor Rights (Crown Transfers) Act*, 1977 and that section 5 of that Act applies to the matter to be determined by this Board.

2. It is noted for the record that the respondent was granted leave to file its reply beyond the time limits set down in this matter.

3. The parties are agreed on all the essential facts in this matter. The applicant trade union is the bargaining agent for 109 employees of the respondent in a single bargaining unit as set out in Article 3 of the collective agreement between the parties effective January 1, 1978:

"ARTICLE 3 – RECOGNITION

3:01 The Regional Corporation recognizes the Union as the collective bargaining agent for all employees of the Regional Municipality of Halton, in its Maintenance and Operations Division of the Department of Public Works, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period."

Included in that bargaining unit are employees who work in "Pollution Control Centres" as indicated in Exhibit #4 which sets out the organization of the respondent's Public Works Department.

4. On May 17, 1978 the respondent entered into an agreement with Her Majesty the Queen in right of Ontario as represented by The Minister of the Environment for the transfer of sewage treatment plants (Pollution Control Centres) in Burlington and Georgetown to the respondent. At the time of the transfer there were 10 employees in those plants who were represented by the intervener and covered by a collective agreement between the intervener and The Crown in right of Ontario. (Exhibit #3)

5. There has been an intermingling of the "transferred employees" and the employees of the respondent represented by the applicant.

6. All concerned are agreed that there should be one bargaining unit and that that bargaining unit should be as described in Schedule A, paragraph (iv) of the application. The only question before the Board is whether it should exercise its discretion and grant the relief requested in the application or order a vote as requested by the intervener.

7. In *Owen Sound General and Marine Hospital*, [1978] Board File No. 1980-77-R and 0036-78-R, the Board was faced with an intermingling of employees when a "provincial psychiatric hospital" was transferred to a general hospital. There many employees of the provincial hospital, both nurses and service employees, were represented by the Ontario Public Service Employees Union as part of its comprehensive province-wide bargaining unit; the Board also had to determine appropriate bargaining units because of the different patterns in the representation of employees in the two hospitals; and the transferred employees would be distributed among the bargaining units. The Board concluded there that it was difficult "to compare the relative support enjoyed by the bargaining agents" simply because we cannot compare like bargaining units and ordered a vote in all the appropriate bargaining units.

8. Here we are faced with none of the problems which confronted the Board in

Owen Sound General and Marine Hospital. The matter at hand more closely resembles *Alliance Dairy* [1966] OLRB Rep. Aug. 337. While transfers between sectors undoubtedly may give rise to their own peculiar sets of problems, the *Owen Sound General and Marine Hospital* case did not lay down any general rule that a vote will always be ordered in such a transfer. In this matter there is no difficulty concerning an appropriate bargaining unit and the transferred employees represent only slightly over 8 per cent of the employees in the unit. There is, therefore, no difficulty in ascertaining the relative support enjoyed by the bargaining agents. It would therefore seem to be unnecessarily disruptive to labour relations between the respondent and its employees to order a vote under these circumstances.

9. The Board, therefore, declares that, effective on the date of this decision:

- (a) the respondent is no longer bound by the collective agreement between the Ontario Public Service Employees Union and Crown in right of Ontario (Ministry of Environment) as represented by the Management Board of Cabinet;
- (b) the employees of the respondent covered by the collective agreement referred to in paragraph (a) and those covered by the collective agreement between the respondent and the applicant constitute one appropriate bargaining unit which is defined as follows:

“All employees of the Regional Municipality of Halton, in its Maintenance and Operations Division of the Department of Public Works, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.”

- (c) both employees of the respondent formerly covered by the collective agreement referred to in paragraph (a) and the employees covered by the collective agreement between the respondent and the applicant are bound by the collective agreement between the respondent and the applicant.

0441-78-R United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant), v. **Ka-Be Enterprises**, (Respondent).

Certification – Construction Industry – Certificate to employer engaged in repair and maintenance of buildings – Fact that repair work completed held not relevant

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

DECISION OF THE BOARD; August 25, 1978

1. In a decision dated June 21, 1978, the Board issued a certificate to the applicant with respect to a bargaining unit of carpenters and carpenters' apprentices in the Board's geographic area #21. This application was filed on May 30, 1978 and the terminal date was initially fixed as June 9, 1978. The Board endeavoured to contact the respondent between June 6 and June 12, 1978, in order to ascertain whether the Form 52, Notice to Employees of Application for Certification, Construction Industry, had been posted in a conspicuous place where it was most likely to come to the attention of all employees who might be affected by the application. Messages were left with the respondent's answering service with respect to such an inquiry. The respondent did not return any of the Board's telephone calls. On June 12, 1978, the Board directed the Registrar to fix a new terminal date. The new terminal date was fixed as June 20, 1978, and the employees who appeared to be affected by this application were served by mail. The Board notes that none of the Board's correspondence which was addressed to the respondent at 9 McPhail Street, Sault Ste. Marie, has been returned by the Post Office and that in a letter dated July 5, 1978, the respondent has indicated that its address is indeed 9 McPhail Street, Sault Ste. Marie.

2. In the letter dated July 5, 1978, the respondent has stated that it was not notified of this application and that it assumes that the certificate will be cancelled. In its letter the respondent has referred to (i) the nature of its enterprises, (ii) the applicant, (iii) the view point of its carpenters, (iv) the view point of the respondent and (v) a conclusion.

3. For the purpose of considering the letter dated July 5, 1978, the Board will assume, without deciding, that the respondent did not receive notice of this application and that this letter constitutes its reply to this application. The Board notes that the respondent does not dispute any of the findings which were made in its decision of June 21, 1978.

4. The comparatively recent origin of the respondent and the nature of its work which requires a small and highly skilled workforce are not matters which in themselves would disentitle the applicant to certification under The Labour Relations Act. The fact that the applicant has attempted unsuccessfully to obtain voluntary recognition from the respondent does not affect the merits of this application. While the respondent's employees may have expressed a reluctance to Mr. Ujanen to accept jobs which lasted only a few weeks because of the applicant's procedure within its hiring hall, they have not indicated any opposition to this application for certification. The Board points out that Form 52 informs the employees of the steps they may take if they wish to oppose an application for certification. The respondent has raised objections to paying wages and benefits under a collective agreement and to the possibility that carpenters who may be supplied by the applicant may not be able to do the work which the respondent requires. In our view, these objections are matters for collective bargaining between the parties. Such objections do not, under The Labour Relations Act, affect the applicant's entitlement to certification. The respondent has concluded that the work has finished and that it will cease its operation as a construction company. Once again, this is not a factor in determining the merits of this application for certification. The respondent appears to regard repair and maintenance of buildings as beyond the purview of work within the construction industry. The Board points out that section 1(1)(f) of The Labour Relations Act defines construction industry as follows:

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings,

structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;”.

5. For the foregoing reasons the Board affirms its decision in this matter dated June 21, 1978, and the certificate which was issued thereunder.

0362-78-R Ontario Hydro Employees Union, Local 1000, (Applicant) v. Ontario Hydro, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener # 1), v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener # 2).

Certification – Construction Industry – Certificate to employer engaged in repair and maintenance of buildings – Fact that repair work completed held not relevant

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members C. G. Bourne and W. Rutherford.

APPEARANCES: *C. M. Mitchell and B. Vincer appearing for the applicant; Robert A. Abbott and Ross Dunsmore appearing for the respondent; Douglas J. Wray and Audrey Kaami appearing for Intervener # 1; no one appearing for intervener # 2.*

DECISION OF THE BOARD; August 14, 1978

1. This is an application for certification wherein the applicant is seeking to displace intervener # 1 as the bargaining agent for certain employees of the respondent employed at its J. Clark Keith generating station at Windsor. It is the contention of intervener # 1 that the bargaining unit involved consists of employees at both the J. Clark Keith generating station as well as the respondent's Richard L. Hearn generating station in Toronto.

2. The Board's general practice in certification applications where an incumbent union holds bargaining rights is to describe the bargaining unit in the same terms as the unit set forth in the most recent collective agreement between the employer and the incumbent union. See: *Gilbey Canada Limited* [1974] OLRB Rep. April 257. Departures from this practice, however, have occurred where so warranted by the facts involved. See, for example, *Indusmin Limited* [1971] OLRB Rep. May 264. In the instant case it was not suggested that any departure from the Board's general practice was called for, although as already indicated the parties are in disagreement as to the scope of the bargaining unit covered by the most recent collective agreement.

3. Intervener # 1 obtained its bargaining rights at the Keith and Hearn generating stations by way of separate Board certificates in 1961. Formerly the bargaining rights at these two generating stations had been held by the International Union of Operating Engineers.

4. From the time of intervenor #1's certification in 1961 until 1975, intervenor #1 and the respondent bargained for the employees at both the Hearn and Keith stations at the same time but included the results of their negotiations in two separate, albeit almost identical, documents, each such document clearly being a collective agreement relating to a bargaining unit of employees at one of the generating stations. In 1975, however, and again for the most recent collective agreement in 1977, the negotiations resulted in a single document covering employees at both locations. It is the position of intervenor #1 that this document represents a single collective agreement covering a single bargaining unit comprised of employees at both generating stations. The applicant, however, contends that within the document is to be found two collective agreements, each covering a separate bargaining unit of employees at one of the two generating stations. The respondent declined to adopt a position one way or the other with respect to this issue.

5. Prior to 1975 the collective agreement relating to the bargaining unit of employees at the Hearn generating station was headed up as follows:

COLLECTIVE AGREEMENT
Between
ONTARIO HYDRO
– and –
THE RICHARD L. HEARN G. S. UNIT
of
THE CANADIAN UNION OF OPERATING ENGINEERS
(hereinafter called the Union)

A similar heading was utilized for the collective agreement relating to the employees at the Keith generating station. The documents entered into in both 1975 and 1977 contain the following heading:

COLLECTIVE AGREEMENT
Between
Ontario Hydro
and
THE RICHARD L. HEARN G.S. UNIT
and
THE J. CLARK KEITH G. S. UNIT
of
THE CANADIAN UNION OF OPERATING ENGINEERS
(hereinafter called the Union)

Attached to the 1977 agreement are two appendices. Both of the appendices in indicating their connection with the agreement repeat the above heading in full.

6. Prior to 1975 the recognition clause in each collective agreement referred only to one generating station. The 1975 and 1977 documents both contain the following recognition clause in article 1:

“Ontario Hydro recognizes the Union as the exclusive bargaining agent

of all employees at the Richard L. Hearn Generating Station at Toronto and the J. Clark Keith Generating Station at Windsor, save and except shift supervisors, foremen, persons above the rank of foreman, office staff, electrical operators, and technicians.”

7. Nowhere in the most recent agreement between the respondent and intervener #1 does it specifically state that it comprises two separate collective agreements. Indeed to the contrary the phrase “this collective agreement” is to be found throughout. In several articles specific mention is made of the Hearn and Keith generating stations, but apart from article 22.03 these references are not inconsistent with one bargaining unit comprised of employees at both generating stations. Article 22.03, however, in dealing with leaves of absence refers specifically to the existence of two separate bargaining units in the following terms:

“A leave of absence to a maximum of twelve months will be granted to employees taking positions with the union where the duties of such positions will involve the employees of either the Richard L. Hearn or the J. Clark Keith bargaining units, and provided the position is for bona fide union work”.

8. Although Intervener #1 in its own name clearly holds the bargaining rights with respect to employees at both the Hearn and Keith generating stations, its members are grouped into separate locals, namely into Local 100 at the Keith generating station and Local 110 at the Hearn generating station. These two locals appear to function primarily as “servicing locals” for Intervener #1. Each of the locals has its own president.

9. Until 1975 whenever a collective agreement was executed generally one of those signing on behalf of intervener #1 was the president of the local at the generating station covered by the agreement. The signature page on both the 1975 and 1977 agreements reads as follows:

SIGNED ON BEHALF OF
ONTARIO HYDRO

President

Secretary

SIGNED ON BEHALF OF
CANADIAN UNION OF
OPERATING ENGINEERS

General President

General Secretary-Treas.

Business Manager

President – Local 110
(Hearn G. S. Unit)

President – Local 100
(Keith G. S. Unit)

Duly appointed to execute
this agreement on behalf
of the Union and its members.

10. The general industrial relations practice is to include in a document only the terms of one collective agreement covering a single bargaining unit. However, it is possible to have one document relate to two or more separate bargaining units such as to have the one document serve as separate collective agreements for each of the bargaining units involved. The task before the Board is to ascertain whether at the time the respondent and intervener #1 switched from executing two separate documents to only one they effectively merged the two bargaining units into one, or whether for the sake of convenience they merely consolidated two collective agreements into one document leaving untouched the scope of two separate bargaining units. Neither the respondent nor intervener #1 saw fit to lead any evidence as to what their purpose was at the time they moved from using two documents to only one.

11. The recognition clause set out above is in the form which one would normally associate with a single bargaining unit. Further, as already noted most of the articles in the document are not at all inconsistent with the notion that only one bargaining unit is involved. Notwithstanding these facts, however, we are of the view that the document is meant to relate to two separate bargaining units and to serve separately as a collective agreement for each. Important to our determination in this regard is the heading to the agreement which, along with the heading to the two appendices, refers to "the Richard L. Hearn G. S. Unit" and "the J. Clark Keith G. S. Unit". Had the agreement meant to refer only to one bargaining unit it is unlikely that the heading to the agreement would specifically refer to two separate units. In addition, there is the leave of absence provision in article 22.03 quoted above which refers to "the Richard L. Hearn or the J. Clark Keith bargaining units"; a clear indication that there are two units. Finally, the reference on the signature page of the document to the "Hearn G. S. Unit" and the "Keith G. S. Unit" is also suggestive of two bargaining units.

12. Having regard to our conclusion that the employees at the Hearn and the Keith generating stations are currently included in separate bargaining units, and to the lack of any submissions that the Board should depart from its general practice in determining the bargaining unit in displacement applications, the Board finds that all employees of the respondent at its J. Clark Keith generating station at Windsor, save and except shift supervisors, foremen, persons above the rank of foreman, office staff, electrical operators and technicians constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The filings of the respondent indicate that on the date of the making of this application there were nine employees in the bargaining unit. The applicant submitted evidence of membership on behalf of eight of these persons, a situation which would normally cause the Board to direct the immediate taking of a representation vote between the applicant and incumbent trade union. Counsel for intervener #1, however, submitted that if any such vote were to be ordered it should be deferred into the future due to a planned build up in the number of employees at the Keith generating station. Counsel for the respondent in response to this submission informed the Board that it is the respondent's intention to begin increasing the number of employees at the generating station in August of 1979 so that by the end of 1979 some 75 to 100 additional employees will be working at the station.

14. In certain situations where there is a planned build-up of employees the Board will postpone the taking of a representation vote. The considerations which the Board takes

into account in deciding whether or not to take such a step are outlined in the following excerpt from *The Wix Corporation Limited* case [1975] OLRB Rep. Aug. 637.

“The principles underlying the Board’s policy on ‘build-up’ were explained in some detail in the *Emil-Frant and Peter Waselovich* case 57 CLLC ¶18,057 at p. 169. In brief, the build-up policy is an attempt to balance the rights of existing employees to representation for collective bargaining purposes with the rights of future employees to select a bargaining agent of their free choice upon the likelihood that a substantial increase in the work force will take place within a reasonable period of time. The Board’s concern for the rights of future employees is premised on the assumption that in the event bargaining rights are conferred on a trade union on the basis of an unrepresentative constituency the new employees would have to wait ‘a considerable period of time because of the provisions of The Labour Relations Act relating to termination of bargaining rights’, before their views may be expressed. It is in this context that the Board requires that it be satisfied that the employer’s programme for the increase in its work force take place ‘within a reasonable period of time’ ”

15. In the instant case the respondent does not even project commencing a build-up in its work force for a full year and even then the increase in staff is slated to occur over a period of some months. To our minds this represents an unduly long period of time in which to deny the existing employees the ability to change their bargaining agent. Further, assuming the applicant is successful in an immediate representation vote, because of the long delay before the increase in employees is projected to occur any concern that new employees will have to wait a considerable period of time before having an opportunity to express their views about being represented by the applicant is somewhat reduced. Another consideration is that because of the lengthy period of time involved prior to the projected increase in the work force, it is quite possible that changing conditions or altered priorities may result in the respondent deciding at some point to either scale down or postpone still longer the projected build-up at the Keith Generating Station. Taking all of these considerations into account the Board is satisfied that it should not postpone the taking of a representation vote.

16. The Board is satisfied that more than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 29, 1978, the terminal date fixed for this application, and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. The Board directs that a representation vote be taken of the employees of the respondent. Those entitled to vote are all employees in the bargaining unit on the date hereof who have not voluntarily terminated their employment or been discharged for cause between the date hereof and the date the vote is taken.

18. Voters will be asked to indicate whether they desire to be represented by the applicant or by intervener #1 in their employment relations with the respondent.

19. The matter is referred to the Registrar.

1980-77-R 0036-78-R Owen Sound General and Marine Hospital, (Applicant), v. Ontario Public Service Employees Union; Canadian Union of Public Employees; Local 48; and Ontario Nurses' Association and its Local 147, (Respondents), Canadian Union of Public Employees Local 48, (Applicant), v. **Owen Sound General and Marine Hospital,** (Respondent), v. Ontario Public Service Employees Union, (Intervener #1), v. Ontario Nurses' Association, (Intervener #2).

Successor Status – Hospital facility transferred from public to private sector and merged with existing hospital – Transfer held to occur on the actual transfer of functions not date of Board declaration or date of amendment to regulations designating new facility – Successor not bound by agreements with predecessor coming into existence after transfer but union's conduct held constructive notice to bargain for new agreement – Persons formerly excluded from unit by statute not now included since new unit not yet determined by Board – Units defined on private sector model – Terms and conditions in these units frozen pending negotiation of new agreements

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and E.C. Went.

APPEARANCES: *Janice Baker, Roy McCallum and Ronald T. Sapsford for Owen Sound General and Marine Hospital; Chris G. Paliare and James Best for Ontario Public Service Employees Union; S.R. Hennessey, G. Wilson and D. Howell for Canadian Union of Public Employees Local 48; D.G. Casswell and K.C. Hall for Ontario Nurses' Association.*

DECISION OF THE BOARD; August 31, 1978

I THE FACTS

1. These are two applications brought under section 4 of *The Successor Rights (Crown Transfers) Act, 1977*. Both applications deal with a transfer of an undertaking from the Crown to an employer governed by the *Labour Relations Act*. In an earlier decision, dated May 23, 1978, the Board determined the appropriate bargaining units for the merged undertakings, and ordered that a vote be taken in these bargaining units. The eight bargaining units established by the Board followed the pattern established in other hospitals in the Province: a unit of full-time service employees (bargaining unit #1); a unit of part-time service employees (bargaining unit #2); a unit of full-time nurses (bargaining unit #3); a unit of part-time nurses (bargaining unit #4); a unit of full-time paramedical employees (bargaining unit #5); a unit of part-time paramedical employees (bargaining unit #6); a unit of full-time office and clerical employees (bargaining unit #7); a unit of part-time office and clerical employees (bargaining unit #8).

2. This decision deals with certain representations made by the parties following the taking of the votes in these bargaining units. These representations raise important questions concerning the legal and collective bargaining implications flowing from the merger of the two undertakings. The Board has been asked to determine the exact date on which the transfer of the undertaking occurred; the question of whether the successor employer is bound by collective agreements made after the date of transfer but made retroactive to a

date prior to the transfer; the status of those persons formerly employed by the Crown as unclassified staff once the undertaking had been transferred; the question of which union was entitled to union dues collected from certain persons formerly employed by the Crown; and the important question of whether the Board should declare that the employer is no longer bound by those collective agreements made by the Crown in respect of certain employees in the transferred undertaking and, if so, the time at which these obligations should be lifted.

3. Some reference must be made to the facts set out in the Board's previous decision. The two applications arose out of a transfer of the Dr. MacKinnon Phillips Hospital to the Owen Sound General and Marine Hospital. The former institution is a psychiatric hospital which, prior to the transfer, was owned and operated by the Crown in Right of Ontario. The Owen Sound General and Marine Hospital is a general treatment hospital incorporated under the laws of the Province and governed by a board of directors. For ease of reference the Dr. MacKinnon Phillips Hospital will be referred to as the psychiatric hospital and the Owen Sound General and Marine Hospital will be referred to as the general hospital.

4. The two hospitals are located some four miles apart, the general hospital being situated in Owen Sound and the psychiatric hospital in the Township of Sydenham. For approximately a year prior to the transfer, the psychiatric hospital shared a part of its facilities with the general hospital, leasing to the general hospital a ward (Ward F) which the general hospital used as an extended care unit for the care and treatment of some thirty-four patients. This arrangement, however, was merely an interim measure to resolve the general hospital's problem of overcrowding.

5. The long-term solution worked out by the Ministry of Health and the general hospital was a merger of the psychiatric hospital and the general hospital into one institution to be owned and operated by the general hospital. The first stages of the merger commenced on April 1, 1978, when the land and chattels of the psychiatric hospital were transferred to the general hospital. At that time all patients on the rolls of the psychiatric hospital were transferred to the rolls of the general hospital, as were their medical records. Prior to April 1st, letters had been sent to all persons employed at the psychiatric hospital offering employment with the general hospital effective from that date. Bargaining unit employees at the psychiatric hospital were offered terms of employment and benefits in accordance with the existing collective agreements for the period preceding a determination by this Board on the allocation of bargaining rights. Apparently most of these employees agreed to accept employment with the general hospital.

6. The merger, according to the present plan, will result ultimately in one institution located at the site of the former psychiatric hospital in Sydenham Township. At the present time, however, the merged institution is operating at both the Owen Sound and Sydenham Township locations while the physical merger is completed in stages. A renovation to the former psychiatric hospital is about to be undertaken and, later, an active treatment wing will be added to that facility. It is planned that some patients will be transferred from the Owen Sound location to the Sydenham Township location upon the completion of the renovations, and that all patients will be transferred to this location when the new wing is built.

7. A consolidation of the operations of the psychiatric hospital and the general hospital was set in motion as of April 1st. Although this consolidation is far from complete,

there is now one administrative structure for the merged institution and some intermingling of employees has taken place. At the present time 90 employees (not all bargaining unit members) out of the 922 persons employed by the merged institution have either been transferred or rotated so that employees who worked for what were formerly separate institutions are now working alongside one another. The evidence indicated that the intermingling of employees will increase as the consolidation of the two operations continues.

8. Some further facts should also be set out. An agreement, dated May 5, 1978, was entered into between the Ministry of Health and the general hospital setting out the terms of the transfer, and making such terms effective as of April 1, 1978. This agreement provided, among other matters, that the Ministry of Health would "continue to administer payroll and fringe benefits for those civil servants covered by successor rights legislation until the O.L.R.B. deals with the representation rights issue"; that the Ministry would "provide funds to cover the costs in implementing the personnel provisions arising from the amalgamation"; and that transferring employees would be "eligible for retroactive salary revisions effective prior to April 1, 1978". Two days prior to the making of this agreement, on May 3rd, two regulations were made – one amending Regulation 576 of *The Mental Health Act*, R.S.O. 1970, c. 269, and the other amending Regulation 578 of *The Mental Hospitals Act*, R.S.O. 1970, c. 270, as amended. The effect of the first regulation was to substitute The Owen Sound General and Marine Hospital (Dr. MacKinnon Phillips unit) for the Dr. MacKinnon Phillips Hospital as a designated psychiatric facility while the effect of the second was to strike the Dr. MacKinnon Phillips Hospital from the schedule of designated psychiatric facilities under *The Mental Hospitals Act*.

9. On April 1, 1978, there were in existence seven collective agreements between the Ontario Public Service Employees Union (OPSEU) and the Crown in Right of Ontario relating to salary rates alone. These separate collective agreements were in respect of employees falling within the Scientific and Professional Services Category; employees falling within the Administrative Services Category; employees falling within the Maintenance Service Category; employees falling within the General Operational Services Category; employees falling within the Technical Services Category; employees falling within the Office Services Category; and employees falling within the Clerical Services Category. A collective agreement between these same parties, relating to the working conditions of all the occupational categories and including a provision for check-off of union dues, was reached on April 26, 1978. This agreement covered the period from February 1, 1978, until January 31, 1979, and provided that its implementation date was to be April 24, 1978, the date of receipt of official notice of ratification. On May 27, 1978, a further collective agreement relating to employee benefits for all occupational groups and covering the period October 1, 1977 until September 30, 1978 was reached by the Crown and OPSEU. Finally, on July 20, 1978, an arbitration award was rendered relating to wage rates for employees falling within the Institutional Care and Correctional Services Category.

10. The evidence also indicated that unclassified staff working at the MacKinnon Phillips Hospital were informed by memorandum, on March 15, 1978, that their unclassified appointments would not be renewed after March 31, 1978, but that the general hospital would offer unclassified staff a position similar to their job at that time, such offers to be effective from April 1, 1978. On that same day unclassified staff were offered such employment by the general hospital. Unclassified staff who accepted this offer were paid from the commencement of their employment with the general hospital according to the classifica-

tions and wage rates then in force at the general hospital, even though they continued to work at the psychiatric hospital after the transfer. If there existed no comparable job classification at the general hospital, however, then these employees were paid at the same rate that they formerly received as unclassified staff working for the Ministry of Health.

II APPLICABLE LEGISLATION

11. The statutory provisions establishing the respective rights and obligations of the parties where there is a transfer from the Crown to an employer governed by the *Labour Relations Act* are found in *The Successor Rights (Crown Transfers) Act, 1977*. The provisions relevant to the disposition of this case are set out below:

1. – (1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

(2) Where an undertaking is transferred from the Crown to an employer while an application is before the Tribunal for representation rights in respect of employees employed in the undertaking or for a declaration that an employee organization no longer represents employees employed in the undertaking, the application shall be transferred to the Board and the employer is the employer for the purposes of the application as if named as the employer in the application until the Board declares otherwise.

(3) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has been granted representation rights under any Act and has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Board declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement, as the case requires.

4. – (1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause *a*;
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
 - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

(2) Where an undertaking is transferred from the Crown to an employer or from an employer to the Crown, any person, employee organization, trade union or council of trade unions may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown,

- (a) within sixty days after the transfer of the undertaking; or
- (b) within sixty days after written notice is given by the employee organization, trade union or council of trade unions of desire to bargain to make or renew, with or without modifications, a collective agreement,

and the Board or the Tribunal, as the case requires, may terminate the bargaining rights of the employee organization, trade union or council of trade unions bound by a collective agreement in respect of employees employed in the undertaking or that has given notice, as the case may be, if in the opinion of the Board or the Tribunal, the transferee of the undertaking has changed the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer.

5. – (1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees

employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
 - (i) any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

(2) Where an employee organization, trade union or council of trade unions is declared to be a bargaining agent under subsection 1 and is not already bound by a collective agreement with the successor employer in respect of employees employed in the undertaking that was transferred, the employee organization, trade union or council of trade unions is entitled to give to the successor employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement.

6. – (2) Except as otherwise provided in this Act, where an undertaking is transferred from the Crown to an employer, *The Labour Relations Act* applies to a bargaining agent that has representation rights in respect of the employees employed in the undertaking and to the employees and where an undertaking is transferred from an employer to the Crown, *The Crown Employees Collective Bargaining Act, 1972* applies to a bargaining agent that is certified as a bargaining agent in respect of the employees employed in the undertaking and to the employees.

10. For the purposes of *The Crown Employees Collective Bargaining Act, 1972* and *The Labour Relations Act*, notice given under this Act of desire to bargain, to make or renew, with or without modifications, a collective agreement or a declaration by the Board or the Tribunal that an employee organization, trade union or council of trade unions is the bargaining agent in respect of the employees in a bargaining unit has the same effect as the granting of representation rights or certification as bargaining agent.

III THE DATE OF THE TRANSFER OF THE UNDERTAKING

12. Counsel for OPSEU submitted that it was not the date of the transfer of the undertaking that was the significant date for determining the exact scope of the collective bargaining obligations inherited by the employer but, rather, the date that the Board makes its declaration under subsection (1) of section 2. In other words, the successor would be bound by any collective bargaining obligation of the Crown made prior to this latter date. The Board does not consider that section 2 can be read in this manner. In our view, this statutory provision simply provides that the successor employers inherit those collective bargaining obligations of the Crown existing at the time at which the undertaking is transferred. Otherwise successor employers would be subject to future liabilities of an indeterminate nature over which they would have no control.

13. The exact date of the transfer of an undertaking is a question that must be answered where there is some dispute over the exact scope of the obligations inherited by the successor employer. Counsel for OPSEU, arguing in the alternative, submitted that "in law" the transfer could only have taken place on May 3, 1978, arguing that until that time the Ministry of Health, under section 6(1) of *The Mental Hospitals Act*, was still responsible for the administration of the psychiatric hospital since the psychiatric hospital was included in the schedule in Regulation 578 until that time. It was argued, moreover, that the merged undertakings were not designated as a psychiatric facility until May 3rd, precluding a lawful transfer of patients until that date because of the operation of sections 22 and 23 of *The Mental Health Act*. While the amendment of the legal designations has to be given some weight, the Board considers that this factor cannot be determinative in identifying the date at which the transfer took place. It is the time of the actual transfer of the functions of the undertaking from the Crown to the new employer that must be identified. This time can only be identified by a consideration of all the circumstances surrounding the transaction.

14. The evidence clearly indicates that the actual transfer of functions from the Crown to the general hospital occurred on April 1, 1978, even though certain legal arrangements were made after that date. The most important factor, in our view, was that the transfer of employees from the psychiatric hospital to the general hospital took place as of April 1st. As well, it is clear that the general hospital and the Ministry of Health had identified April 1st as the date of transfer, making their arrangements effective as of that date. Accordingly, the Board concludes that the transfer of the undertaking took place on April 1, 1978.

IV THE OBLIGATIONS OF THE SUCCESSOR EMPLOYER

15. The extent of the collective bargaining obligations inherited by the hospital must be determined by reference to those obligations existing as of April 1st. At that point of time the Crown was bound by the seven collective agreements, and was bargaining with OPSEU in respect of the renewal of the other three collective agreements. The general hospital, by operation of section 2(1) of *The Successor Rights (Crown Transfers) Act, 1977*, therefore, became bound upon the transfer of the undertaking by the seven collective agreements between the Crown and OPSEU in respect of those employees falling within the OPSEU bargaining unit. The general hospital, however, did not become subject to the three collective agreements coming into existence after the date of transfer, even though these agreements were made retroactive to a date prior to the transfer of the undertaking. The obligations arising from these agreements were simply not in existence at the date of the transfer of the undertaking and could not pass at that time.

16. Collective bargaining obligations of a different order, however, were in existence at that time, and inherited by the general hospital. By operation of section 2(3) of *The Successor Rights (Crown Transfers) Act, 1977*, OPSEU was entitled to give to the general hospital written notice of desire to bargain to renew the three agreements it was then re-negotiating with the Crown. It is clear from the evidence that at no time did OPSEU relinquish its claim to these bargaining rights. In these circumstances, therefore, the Board is prepared to find that OPSEU'S conduct amounted to constructive notice to bargain upon the transfer of the undertaking. This notice, by operation of section 10 of *The Successor Rights (Crown Transfers) Act, 1977*, would have the same effect as the granting of representation rights or certification as bargaining agent, and would invoke subsection (1) of section 10 of *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1970, c. 208, as amended, freezing the established pattern of the employment relationships of the persons falling within the OPSEU bargaining unit. This freeze would apply from the date of the transfer of the undertaking until this decision of the Board establishing bargaining rights for the new bargaining structure.

V POSITION OF UNCLASSIFIED EMPLOYEES

17. The position of the unclassified employees of the Ministry of Health hired by the general hospital must be examined in the light of these conclusions. The OPSEU bargaining unit, as set out in working conditions collective agreement, is defined in terms of "all public servants other than those who are not employees within the meaning of clause g of subsection 1 of section 1 of *The Crown Employees Collective Bargaining Act*". Article 3 of that collective agreement, titled "Seasonal or Part-Time Employees" provides that "[t]he only terms of this Agreement that apply to employees who are not civil servants are those that are set out in this Article". If unclassified employees fell within this bargaining unit description and continued to work at the psychiatric hospital after the transfer, then their terms and conditions of employment would be the subject of the freeze resulting from the giving of notice to bargain, in the same way that the terms and conditions of employment of the classified employees would be the subject of such a freeze. On the other hand, if these employees fell outside the bargaining unit, then they would not derive any benefit from the preservation of the OPSEU bargaining rights under section 2 of *The Successor Rights (Crown Transfers) Act, 1977*, being in exactly the same position as any other person hired to perform work falling outside the OPSEU bargaining unit.

18. The situation in this case is somewhat different than that occurring in *Beechgrove Regional Children's Centre*, Board File No. 0520-78-R, where unclassified staff who were re-

hired after the transfer of an undertaking were treated as an accretion to the bargaining unit. In that case, the Board, having already established a new bargaining unit for the transferred undertaking, made a determination that unclassified employees fell within its scope. That stage has not yet been reached in these proceedings as the Board's earlier decision in this case simply preserves the bargaining rights carried over from the public sector until a new bargaining structure is defined and bargaining rights allocated. The question in this case, therefore, is simply whether unclassified employees fell within the bargaining structure existing at the transfer of the undertaking.

19. Evidence concerning only one of these unclassified persons was presented at the hearing. Douglas Wardell was hired on a temporary basis as an ambulance driver for a four month period commencing in June 1977. This appointment was extended on two occasions so that he worked continuously for the Ministry of Health from June 1, 1977 to March 31, 1978. Wardell was terminated by the Ministry of Health as of March 31, 1978 but was then hired by the general hospital as of April 1, 1978, and continued to perform the same work as before. During his employment with the Ministry of Health, union dues were deducted from his pay, OHIP benefits were provided to him after four months service, and payment for statutory holidays was made. On the evidence, the Board cannot conclude that Wardell is excluded from the bargaining unit because he falls within the scope of section 1(1)(g) of *The Crown Employees Collective Bargaining Act*. Given the length and continuity of Wardell's employment, it cannot be said that he was engaged for "a project of a non-recurring kind", as argued by counsel for the hospital. Our conclusion is that Wardell was a member of the OPSEU bargaining unit at the date of the transfer of the undertaking. Although there is not sufficient evidence before the Board to deal with the status of the other unclassified employees, the Board considers that the Wardell determination may assist the parties in reaching agreement on the status of the other classified employees. If agreement is not reached, then the Board remains seized to resolve any outstanding questions relating to the status of unclassified employees.

VI ENTITLEMENT TO UNION DUES

20. The uncertain situation following the transfer of the undertaking has also given rise to the question of which bargaining agent is entitled to the union dues collected from employees working at the psychiatric facility. Given that the effect of the Board's earlier decision was simply to preserve OPSEU's bargaining rights pending a redefining of the bargaining structure and the allocation of bargaining rights, it appears clear that OPSEU is entitled to any union dues collected in this interim period. Until the Board has established new representation rights, then it is OPSEU that continues to represent those employees in the bargaining structure carried over from the public sector. After the date of this decision establishing bargaining rights for the new bargaining structure, however, the entitlement to union dues will be governed by the rights flowing from this new structure.

VII THE NEW BARGAINING STRUCTURE

21. The Board is now at a stage where it can declare which trade union shall be the bargaining agent for the bargaining units defined in the earlier decision. The question is whether the Board should exercise its power under section 5(1)(a) and declare that the employer is no longer bound by the OPSEU collective agreements. Having defined a new bargaining structure to accord with the pattern of bargaining in the hospital sector, it would be somewhat inconsistent if we were to allow to continue collective agreements shaped by the needs of another sector. In the Board's view, the parties should commence to bargain immediately for collective agreements more appropriate to the sector to which the undertaking has been transferred. The Board, therefore, declares that, as of the date of this decision, the Owen Sound General and Marine Hospital is no longer bound by those collective agreements preserved by operation of section 2 of *The Successor Rights (Crown Transfers) Act, 1977*.

22. This declaration, however, does not mean that the employment relationship of employees covered by those collective agreements is no longer preserved as it existed prior to the declaration. Section 10 of *The Successor Rights (Crown Transfers) Act, 1977* provides that a declaration by the Board that a trade union is the bargaining agent in respect of employees in a bargaining unit has the same effect as certification. The bargaining agents, therefore, are entitled to give notice to bargain under section 13 of the *Labour Relations Act*, thereby invoking the freeze imposed by subsection (1) of section 10 of *The Hospital Labour Disputes Arbitration Act*. This freeze would serve to preserve the established employment relationship patterns of all employees within the respective units. It is recognized by the Board that, because of the intermingling in these units of employees from what were two distinct institutions, there will be more than one pattern within each bargaining unit preserved by the statutory freeze. In the Board's view, however, it is better than any such anomalies be resolved through the bargaining process than through unilateral action by the hospital prior to the commencement of bargaining.

23. On the taking of the representation vote directed by the Board for bargaining unit #1, more than 50 per cent of the ballots cast were cast in favour of the Canadian Union of Public Employees.

24. A certificate will issue to the Canadian Union of Public Employees with respect to bargaining unit #1.

25. On the taking of the representation vote directed by the Board for bargaining unit #2, more than 50 per cent of the ballots cast were cast in favour of the Ontario Public Service Employees Union.

26. A certificate will issue to the Ontario Public Service Employees Union with respect to bargaining unit #2.

27. On the taking of the representation vote directed by the Board for bargaining unit #3, more than 50 per cent of the ballots cast were cast in favour of the Ontario Nurses' Association.

28. A certificate will issue to the Ontario Nurses' Association with respect to bargaining unit #3.

29. On the taking of the representation vote directed by the Board for bargaining unit #4, more than 50 per cent of the ballots cast were cast in favour of the Ontario Nurses' Association.
30. A certificate will issue to the Ontario Nurses' Association with respect to bargaining unit #4.
31. On the taking of the representation vote directed by the Board for bargaining unit #5, not more than 50 per cent of the ballots cast were cast in favour of the Ontario Public Service Employees Union.
32. The application with respect to bargaining unit #5 is therefore dismissed.
33. On the taking of the representation vote directed by the Board for bargaining unit #6, not more than 50 per cent of the ballots cast were cast in favour of the Ontario Public Service Employees Union.
34. The application with respect to bargaining unit #6 is therefore dismissed.
35. On the taking of the representation vote directed by the Board for bargaining unit #7, more than 50 per cent of the ballots cast were cast in favour of the Ontario Public Service Employees Union.
36. A certificate will issue to the Ontario Public Service Employees Union with respect to bargaining unit #7.
37. On the taking of the representation vote directed by the Board for bargaining unit #8, not more than 50 per cent of the ballots cast were cast in favour of the Ontario Public Service Employees Union.
38. The application with respect to bargaining unit #8 is therefore dismissed.
39. The Registrar will destroy the ballots cast in these representation votes taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.
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1135-77-R Ontario Haulers Union, (Applicant), v. **Repac Construction & Materials Limited**, (Respondent), A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183, (Intervener #1), v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230, (Intervener #2), v. Labourers' International Union of North America, Local 183, (Intervener #3), v. The Metropolitan Toronto Road Builders' Association, (Intervener #4).

Certification – Trade Union Status – Status refused in two earlier cases – Purported union closely association with organization which includes independent contractors – Purported union also associated with business entity – Existence of relationships prejudicial to union status – Further hearing scheduled to clarify relationship

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members C. G. Bourne and P. J. O'Keeffe.

APPEARANCES: *J. McNamee and A. Natale for the applicant; S. C. Bernardo and Len Racioppa for the respondent and intervener #4; S. B. D. Wahl, B. Teichmann, C. Lacombe and I. Raymond for interveners #1, 2 and 3.*

DECISION OF THE BOARD; August 28, 1978

1. This is an application for certification. The applicant has not yet established its status as a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

2. At the commencement of the hearings in this matter counsel for the applicant challenged the right of the interveners to participate in the proceedings. It is undisputed that at the time of the filing of this application there was in existence a subsisting collective agreement between the Metropolitan Toronto Road Builders' Association, of which the respondent is a member, and a council of trade unions acting as the representative and agent of Teamsters Local Union 230 and Labourers International Union of North America, Local Union 183. It was the contention of counsel for the council of trade unions and its constituent members that the employees affected by this application came within the scope clause of this collective agreement. Having regard to this submission it appeared to the Board that the interveners might well have a direct interest in the proceedings, and as a result the Board ruled that the interveners were entitled to participate in the proceedings at least until such time as it was established that they did not have such an interest.

3. By a decision dated January 11, 1978, the Board rejected the submissions of all parties other than the applicant that the Board should refuse to entertain this application. These submissions were based on the circumstances surrounding the dismissal of an application for certification filed by the Ontario Haulers Association Inc. (see: *Repac Construction and Materials Limited* [1976] OLRB Rep Oct. 610) as well as the dismissal of an application for certification filed by the "Ontario Haulers Union", which is the same name employed by the applicant in the instant proceedings (see: *Repac Construction & Materials Limited* [1977] OLRB Rep. Sept. 582). In the earlier Ontario Haulers Union case the Board

declined to find that the applicant had status as a trade union in that it felt that it could not give any credence to the evidence of Mr. A. Natale, who was the only person called to testify with respect to the issue.

4. At the resumption of the hearings in this matter following the issuance of the Board's decision of January 11, 1978, counsel for the other parties contended that in the earlier proceedings involving the "Ontario Haulers Union" the issue of the status of the applicant had been disposed of and that therefore the matter was now *res judicata*. In response to this contention applicant's counsel informed the Board that the applicant in seeking to establish its status in these proceedings would be relying upon events which occurred subsequent to the Board's decision in the earlier proceedings involving the Ontario Haulers Union. On the basis of this information the Board concluded that the matter before it did not involve the same factual situation as was before the Board in the earlier proceedings, and that therefore the doctrine of *res judicata* could have no application. The Board therefore ruled that the applicant was entitled in these proceedings to seek to establish that it is a trade union within the meaning of the Act.

5. Mr. Natale is the President of the applicant. He testified concerning a meeting which was held in his home on October 12, 1977. In all material respects Mr. Natale's evidence as to what occurred at this meeting was supported by the testimony of Mr. Peter Larkin who was in attendance. On the basis of this evidence the board is satisfied that on the evening of October 12, 1977 some 6 to 8 individuals met in Mr. Natale's home and that in the following order they:

- a) passed a resolution to form a trade union,
- b) approved a constitution for an organization to be known as the Ontario Haulers Union,
- c) signed applications for membership into the organization and each paid \$1.00 in initiation fees,
- d) ratified the constitution which had previously been adopted, and
- e) elected an executive.

The above noted steps would appear to satisfy all of the requirements for bringing a trade union into existence as set out in *Alcan Universal Homes* [1969] OLRB Rep. April 55. Notwithstanding this fact, however, certain other matters have caused the Board some concern as to the applicant's status. In particular this relates to an apparent inter-relationship between Mr. Natale, the applicant, the Ontario Haulers Association, Inc. and a firm entitled "Black Diamond Paving and Engineering Co."

6. During his cross-examination Mr. Natale was questioned about the Black Diamond firm. In response to a question from counsel for the respondent Mr. Natale indicated that the firm is owned by his father-in-law, who does not live with him, and that he had no personal involvement with it. When asked about the firm's telephone listing Mr. Natale replied that as far as he was aware the firm had no telephone listing at all. The Bell Telephone directory, in fact, has a listing for the company, with its address being the same as Mr.

Natale's home. The respondent called as a witness Mrs. W. Haines, a security representative for the Bell Telephone Company. Mrs. Haines, relying on Bell Telephone Company records, testified that regularly for a number of recent months a telephone bill has been sent to Mr. Natale's home address in the name of The Black Diamond Paving and Engineering Co., and that the bill has consistently been paid. The Bell Telephone records indicate that the company had been informed by the Black Diamond firm that Mr. Natale was its sole officer. Mrs. Haines also indicated that the bill sent in the name of Black Diamond also includes the cost of two other directory listings for the same number, namely one for the Ontario Haulers Union and the other for the Ontario Haulers Association, Inc.

7. Having regard to Mrs. Haines' testimony, we are satisfied that no credence can be given to Mr. Natale's evidence regarding The Black Diamond firm. Further, we are of the view that Mr. Natale probably does have some connection with the firm. On top of this, the fact that a separate telephone directory listing is maintained for the firm suggests that the firm is currently active. There is nothing to indicate one way or the other, however, whether the firm has any employees.

8. Mr. Natale is the President of both the Ontario Haulers Union and the Ontario Haulers Association, Inc. Mr. Natale testified that both of these organizations operate out of an office in the basement of his home. He also stated that each organization has a separate telephone number. In fact, however, the evidence of Mrs. Haines establishes to our satisfaction that the two organizations utilize the same telephone number as does the Black Diamond firm.

9. The Ontario Haulers Association, Inc. was incorporated as non-profit corporation in March of 1974. The original objects of the association were:

"To promote in every manner the interests of independent truck owners and operators in the Province of Ontario, and to assist in every manner, independent truck owners and operators in the Province of Ontario to promote their interests, including and without limiting the generality of the foregoing, to submit briefs to Federal, Provincial and Municipal governments and all boards, tribunals, commissions and agencies thereof, having authority to license, regulate, control or tax trucks, their operation, their owners or operators or contracts pertaining thereto".

It would appear from these objects that the association was set up to act, at least in part, as a trade association and lobbyist for "independent" truck owners and operators.

10. In 1975 The Labour Relations Act was amended to include dependent contractors within the definition of "employees" under the Act. On July 26, 1976 the objects clause of the Ontario Haulers Association, Inc. was amended, apparently to allow the Association to represent dependent contractors engaged in the haulage industry. The amendment to the objects of the Association was done by adding to the existing objects the following:

"To represent its members and any independent truck owners and operators for whom the corporation may be authorized to act from time to time, for the purposes of regulating relations between them and the

employers of their services generally, negotiating collective agreements, regulating relations between them and their employers pursuant to such agreements, securing recognition and establishing bargaining rights, and for such purposes, to organize its members and any independent truck owners and operators.”

11. As indicated above, the Ontario Haulers Association, Inc. did apply to the Board to be certified. However, when the authenticity of a document being relied upon by Mr. Natale during his testimony in support of the Association’s status as a trade union was put in doubt, the Association sought leave of the Board to withdraw its application. The Board, however, declined to allow such a withdrawal and dismissed the application. Because of these events the Board never did rule upon the Association’s status as a trade union.

12. The letters patent of the Association refer to its objects as being “to promote in every manner the interests of independent truck owners and operators”. There was filed with the Board a copy of a brief submitted by the Association to a committee of the Legislature. In its brief the Association stated that it represented “a group of independent single axle, tandem axle dump trucks and trailer owners, and operators”. It is difficult to ascertain from this information whether in fact the Association represents only individuals who own and drive one truck, or whether it also represents people who own a number of trucks and employ others to drive them. The distinction between the two is important in that persons who employ others have been held not to be dependent contractors at all but rather employers in their own right. The leading case in this regard is *Canada Crushed Stone* [1977] OLRB Rep. Dec. 806. In that case an association of truckers applied to the Board to be certified. The Board, however, found that the three individuals who had been the moving force behind the application for certification were employers in their own right and not dependent contractors, and therefore concluded that the Board was prohibited from certifying the association by section 12 of the Act, which provides that the Board shall not certify a trade union if any employer has participated in its formation or administration or contributed financial or other support to it. In reaching this conclusion the Board made the following observations:

17. “An application of the indicia laid down in the *Nelson Crushed Stone* case is not necessarily determinative of whether a contractor is a “dependent contractor” within the meaning of The Labour Relations Act. In a highly industrialized oligopolistic economy there are countless contractors who are economically dependent but because of the “total character of their business”, cannot avail themselves of the Labour Relations Act as a means of improving their bargaining strength. One need only look to the automotive parts industry where numerous suppliers work under contracts which place them in a position of economic dependence within the indicia laid down in *Nelson Crushed Stone*. These contractors or suppliers, however, are employers in their own right often employing into the hundreds. No one would suggest that the Labour Relations Act be extended to allow such contractors to band together and bargain collectively under the Act. The Labour Relations Act, which is designed to create and maintain a division between employees on the one side, and employers on the other, cannot be read as extending to this type of dependent contractor. In addition to consider-

ing economic dependency, therefore the Board must also consider the "total character of the business" in deciding whether a contractor more closely resembles an employee or an independent contractor in his relationship with the employer. The employment of others is a factor which helps to define the "total character of the business." Is it a factor, however, which in and of itself colours the character of the business so as to remove its owner from the ambit of section 1(ga) of the Act?

20. "In seeking to draw the line in such a way as to bring within the Act those dependent contractors who by the nature of their business more closely resemble employees and to exclude those who more closely resemble independent contractors the Board has been struck by the qualitative difference between the contractor who derives income from the labour of others and the contractor who does not. The Board takes the view that the line must be drawn so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the Act they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of The Labour Relations Act.

22. "If the Board was to extend the benefits of The Labour Relations Act to certain employers simply because of their economic dependency, the result would be to create the very potential for conflict of interest which the Act is designed to prevent. The constitution of the applicant in this matter extends membership eligibility to both dependent contractor-employers and to the employees of these persons conditional upon a finding by the Board that they are "employees" for purposes of the Act. If the applicant were to organize the employees of one of these dependent contractor-employers, the anomalous situation of an employer and his employees belonging to the same union would exist. (See *Dr. George A. Morgan U.A.W. Dental Centre*, [1977] OLRB Rep. Jan. 1.) The Act must be interpreted in such a way as to avoid the potential for conflict of interest which might thus develop if dependent contractor-employers were found to be "dependent contractors" within the meaning of the Act."

13. The importance of the composition of the Ontario Haulers' Association, Inc. derives from the relationship between the Association and the applicant Ontario Haulers Union. As already indicated both are headed up by Mr. Natale, both are headquartered in Mr. Natale's home and both utilize the same telephone number. Further, and more importantly, certain evidence was led before the Board concerning a conversation between Mr. Natale and representatives of the Aggregate Producers Association, which acts as a trade association for aggregate producers in the Province. During his cross-examination Mr. Natale stated that he advised the Aggregate Producers Association that its members should "recognize us". At first he stated he could not recall whether when making this statement he

was referring to the Ontario Haulers Association or the Ontario Haulers Union, although subsequently he stated that he had attended the meeting on behalf of the union. In response to a question from respondent's counsel Mr. Natale testified that at the meeting he indicated that if the aggregate producers signed a letter of recognition there would be no need for the union to go before the Board. Mr. Bill Webb, a director of the Aggregate Producers Association, and at the relevant time the chairman of its transportation committee, also testified with respect to the meeting. Mr. Webb's version of what occurred at the meeting differs in several major respects from that of Mr. Natale. Mr. Webb gave his testimony in a straight forward manner and his account of what occurred was not shaken under close cross-examination. In weighing this against the manner in which Mr. Natale gave his evidence and the number of occasions during these proceedings where the evidence clearly establishes that Mr. Natale was seeking to mislead the Board, the Board accepts Mr. Webb's version of what occurred over that of Mr. Natale. Mr. Webb testified that Mr. Natale indicated that the Ontario Haulers Union had filed several applications for certification but that if the Aggregate Producers Association informed its members that the Association recognized and supported the Ontario Haulers Association, then he, Natale, would "get rid of" the union. When Mr. Webb was asked during his cross-examination if Mr. Natale had only indicated that the outstanding certification applications would go, Mr. Webb replied no, that he understood that both the applications for certification and the union itself would go. From this evidence we can only conclude that the interests of the applicant will willingly be sacrificed in return for benefits given to the Ontario Haulers Association, Inc.

14. Having regard to the facts set out above, we of the view that the applicant and the Ontario Haulers Association, Inc. are simply too interrelated to allow the Board to ignore the relationship when seeking to determine whether the applicant is a trade union within the meaning of the Act. The applicant is, in effect, merely part of a larger complex comprised of both the Ontario Haulers Union and the Ontario Haulers Association. In these circumstances the Board is satisfied that the question of whether the Association is comprised of, and/or acts on behalf of, employers may affect the question of the applicant's status as a trade union. Having regard to the lack of any evidence concerning this issue the Board is satisfied that this matter should be re-listed for hearing for the purpose of entertaining the evidence and representations of the parties on the issue of whether the Ontario Haulers Association, Inc. has as members, and/or acts on behalf of employers excluded from the coverage of The Labour Relations Act. In the rather unusual circumstances of this case, the Board will also entertain evidence and representations on the question of whether the Black Diamond Paving and Engineering Co. is an employer.

15. The matter is referred to the Registrar.

0848-78-U United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency, (Complainant), v. **United Brotherhood of Carpenters & Joiners of America** and The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America, (Respondents).

S-79 – Duty to Bargain in Good Faith – Union Council bargaining with Employer Bargaining Agency – Union having bargaining rights with members of Employer Bargaining Agency for various geographic areas in province – Union striking for recognition from all employers on province wide basis – Strike for recognition inconsistent with scheme of Act and bargaining in bad faith – Union entitled to approach individual employers

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *B.W. Binning, G. Grossman and J. Liberman for the applicant; Stanley Simpson and William Stefanovich for the respondent.*

DECISION OF THE BOARD; August 21, 1978

1. This is an application under section 79 of the *Labour Relations Act* alleging a failure to bargain in good faith contrary to section 14 of the Act.
2. The complainant is an employer bargaining agency designated under the Act to represent certain employers in province-wide bargaining in the industrial, commercial, and institutional sector of the construction industry. This designation, made by the Minister of Labour on March 3, 1978, is set out below:

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232 as amended, I hereby designate the United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency consisting of Acoustical Association of Ontario, Caulking Contractors Association of Ontario, Labour Relations Bureau of Ontario General Contractors Association, Resilient Flooring Contractors Association of Canada as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

1. United Brotherhood of Carpenters and Joiners of America; or
2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
 - (1) the Carpenters District Council of Toronto and Vicinity, or the
 - (2) Lake Ontario District Council, or the
 - (3) Western Ontario District Council, or the
 - (4) Ontario Acoustical and Drywall District Council; or

3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 572, 666, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 2050, 2222, 2451, 2466, 2480, 2482, 2486, 2965, 3227 or 3233 of the United Brotherhood of Carpenters and Joiners of America; or
4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journeymen and Apprentice Carpenters other than Millwrights,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

This designation is subject to the condition that the employer associations which have formed the United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency shall file with my office an executed copy of a satisfactory constitution for the employer bargaining agency before April 30, 1978.

3. The respondent, an employee bargaining agency, was designated under the Act by the Minister on the same date as the complainant. The terms of this designation parallel those of the complainant:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice Carpenters other than Millwrights, represented by the following affiliated bargaining agents:

1. United Brotherhood of Carpenters and Joiners of America; or
2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
 - (1) the Carpenters District Council of Toronto and Vicinity, or the

- (2) Lake Ontario District Council, or the
- (3) Western Ontario District Council, or the
- (4) Ontario Acoustical and Drywall District Council; or
- 3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 572, 666, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 2050, 2222, 2451, 2466, 2480, 2482, 2486, 2965, 3227 or 3233 of the United Brotherhood of Carpenters and Joiners of America; or
- 4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journey-men and Apprentice Carpenters other than Millwrights,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and the institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, bargaining as aforesaid in relation to bargaining rights of the Unions or any of them and the performance of work described or covered by:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
 - (b) voluntary recognition agreements between the Unions or any of them and any employers;
 - (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.
4. Negotiations for a provincial agreement began in early February of this year. Although the designations did not occur until later, the principals at the bargaining table in early February were essentially the same organizations as are now before the Board, except that the Acoustical Association of Ontario was not then represented on the employer side. No less than forty negotiating sessions took place between the parties from February until the date of this application. On June 16, 1978, the Ministry of Labour issued what is commonly referred to as a "no-board report", placing the parties in position to engage in a lawful strike or lock-out fourteen days after the release of such report. A lawful strike commenced on July 4, 1978, and was continuing at the date of the hearing of this matter.
5. The negotiations appear to have been protracted and difficult, as evidenced by the number of meetings between the parties. From the testimony it would appear that jurisdiction, settlement procedures for jurisdictional disputes, and sub-contracting were the more contentious issues for a greater part of the negotiations. By late July, however, the issue of extension of bargaining rights had emerged as a major stumbling block to the settle-

ment of the dispute. At meetings held on July 29th and August 10th the respondent took the position that the extension of union bargaining rights to all areas of the province for the employers now represented by the complainant would stabilize the industry, benefitting union and employers alike. The response from the complainant was that, as an employer bargaining agency, it simply did not have the authority to grant such recognition on behalf of the approximately 4,000 employers that it represented, and that it would be impossible, or at least too time-consuming, for it to seek such authority from the employers. The evidence indicated that at least some of the employers had expressly restricted the bargaining authority of the complainant in their applications for membership in its constituent components, making it clear that the complainant had no authority to extend bargaining rights on their behalf. At the meeting of August 10th, the respondent indicated that it was not prepared to negotiate other outstanding issues, such as wages, until the issue of the extension of bargaining rights had been resolved. No meetings have taken place since August 10th although the respondent has indicated its willingness to continue to meet.

6. The complainant submitted that the conduct of the respondent amounted to a failure to bargain in good faith in contravention of section 14 of the Act. The statutory scheme for provincial bargaining and the designations made under it according to the complainant, contemplated bargaining only in respect of existing bargaining rights. Although conceding that the respondent might be able to approach individual employers for voluntary recognition, the complainant argued that the extension of bargaining rights was not an issue that could be taken to an impasse in provincial bargaining. The complainant's demand for extended recognition, therefore, was an improper and illegal demand, and the Board should make a declaration to such effect.

7. The demand for extended bargaining rights was cast in much different light by the respondent. Voluntary recognition, according to the respondent, was expressly recognized by section 15(3) of the Act, so that a request for voluntary recognition made at the bargaining table was a perfectly legal demand. It was argued that section 133(2) now prohibited voluntary recognition arrangements with individual employers and, hence, the only avenue for voluntary recognition was to request it directly from the employer bargaining agency. The demand for extended bargaining rights, therefore, was a legal demand and could not by itself constitute bargaining in bad faith, since it related to the content of the bargaining rather than to the manner in which bargaining was being conducted.

8. These arguments raise an issue of some difficulty. Certainly, the facts of this case do not reveal any breach of that component of the duty to bargain in good faith requiring a full and informed discussion at the bargaining table. The bargaining, although protracted and difficult, does not in our view indicate any unwillingness on the part of either party to meet and continue the collective bargaining dialogue. The sole question, then, is whether the respondent's insistence upon taking the issue of extension of bargaining right to the point of impasse amounts to a failure to bargain in good faith.

9. The Board, as counsel for the respondent quite correctly stated, does not normally concern itself with the content of collective bargaining when administering the duty to bargain in good faith. See *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199; *Journal Publishing Co. of Ottawa Ltd.*, [1977] OLRB Rep. June 309. In previous cases the Board has concerned itself with the question of whether there has been a refusal to recognize established bargaining rights, or a failure to engage in a full and informed dialogue with the other

party. This latter requirement of full and informed discussion is directed at the manner in which negotiations are conducted, rather than to the content of bargaining demands. In adopting this approach the Board has recognized that the parties should have the freedom to tailor the content of their collective agreement to their own particular circumstances.

10. This general approach of allowing the parties full freedom to bargain the content of their collective agreement has been qualified in only one respect. The Board in the past has made it clear that a party which insists upon a demand that would give rise to an illegality cannot be said to have met the obligation to bargain in good faith. In *T. Barlisen & Sons*, [1960] OLRB Rep. May 80, the Board held that a union which had insisted upon a demand that the collective agreement contain a restriction on the hiring of Italian workers was in breach of the duty imposed by section 14. More recently, in *A.N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504, the Board stated in obiter that "the insistence during bargaining upon a provision that, if accepted, would give rise to an illegality amounts to a breach of the duty to bargain in good faith". Again, in *Croven Limited*, [1977] OLRB Rep. Mar. 162, the Board indicated that it would consider the resort to economic sanctions in pursuit of unlawful or illegal demands as a failure to bargain in good faith.

11. The question squarely before the Board in this case is whether the respondent in insisting upon the extension of bargaining rights was pursuing a demand inconsistent with the scheme of the *Labour Relations Act* and, therefore, illegal. If the demand can be characterized as being inconsistent with the scheme of the Act, then we would be forced to conclude that it would be a failure to bargain in good faith to carry such a demand to the point of impasse. On the other hand, if the demand does not run contrary to the scheme of the Act, it cannot be said that there is any breach of section 14, even though it might be difficult for the complainant to meet this demand. To answer this question the Board must examine both the provisions of the Act establishing provincial bargaining and its provisions dealing with voluntary recognition.

12. The relevant provisions of the *Labour Relations Act* are set out below:

15. – (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

52. – (1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 3 of section 15, the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection 1, the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection 1, the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection 1, the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

127. – (1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) notwithstanding an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

130. Where an employee bargaining agency has been designated under section 127 or certified under section 128 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

131. Where an employer bargaining agency has been designated under section 127 or accredited under section 129 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
- (b) an accreditation heretofore made under section 115 of an employers' organization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 represented or to be represented by the

employer bargaining agency is null and void from the time of such designation under section 127 or accreditation under section 129.

132. – (4) After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106, the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.

133. – (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 127 and 132, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 1, and any collective agreement or other arrangement that does not comply with subsection 1 is null and void.

134. – (2) A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency but only in respect of those employees for whom the affiliated bargaining agents hold bargaining rights and who are employed in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in such sector, and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

13. A reading of the provisions of the Act establishing provincial bargaining indicates that the Legislature intended the foundation of provincial bargaining to be pre-existing local bargaining rights. Section 127(1)(b) clearly provides that the employer bargaining agency is to represent only those employers "for whose employees affiliated bargaining agents hold bargaining rights". The bargaining obligation of these employers then vest in the employer bargaining agency by operation of section 131. On the union side, the bargaining rights of the affiliated bargaining agents, by operation of section 130, vest in the employee bargaining agency designated under section 127(1)(a) of the Act. The legal result is simply a consolidation in the bargaining agencies of those bargaining rights and obligations

existing at the time of designation. No existing bargaining rights are lost and no new bargaining rights are created.

14. This kind of consolidation, of course, creates a situation where an employer, even though represented in provincial bargaining, might not be bound by the provincial agreement for all parts of the province. Certification in the construction industry is based upon geographic areas, the province being divided into 32 such areas. It is quite possible for an employer to be certified for some, but not all, of these areas. By operation of section 134(2) the provincial agreement binds an employer "only in respect of those employees for whom the bargaining agents hold bargaining rights ...". As a result an employer is bound by a provincial agreement only to the extent that the union has acquired bargaining rights.

15. This situation of partial coverage was a serious concern for the respondent and it is clear that the issue of the extension of bargaining rights had become a stumbling block to the settlement of the strike. There is no doubt that the respondent was using its economic sanction of the strike in an attempt to obtain extended recognition at the provincial bargaining table. The implications of this bargaining approach require some exploration.

16. The fact that this demand for voluntary recognition has taken place in the context of provincial bargaining does not appear to be determinative. If such an approach is permitted where there is bargaining between a single union and single employer, then there does not appear to be any reason for restricting it when multi-employer bargaining takes place. The question that must be answered is whether the *Labour Relations Act* permits a trade union to extend bargaining rights by use of the leverage of a strike.

17. The Board in previous decisions has made it clear that the recognition strike is not a proper method of obtaining bargaining rights. As the Board stated in *Radio Lunch* (1950), 50 CLLC ¶17,012:

"It goes without saying that the Board must at all times so administer the legislation so as to encourage compliance with its provisions. We cannot think of anything less likely to secure that result than to adopt a policy with respect to certification proceedings from which the inference might be drawn that aspirants to collective bargaining status may with impunity attempt to acquire that status by improper means and at the same time, on a less desirable but precautionary alternative, come before the Board as applicants for certification ..."

This policy of refusing to entertain a certification application where a union is at the same time attempting to obtain recognition by means of strike action was reaffirmed in *Robert McAlpine Ltd.*, [1961] OLRB Rep. 178. It must be recognized, however, that in these two cases the union was resorting to untimely strike in contravention of the Act, while in this case the strike is timely and lawful.

18. The lawfulness of the strike, however, does not make a demand for voluntary recognition at the bargaining table any more consistent with the scheme and purpose of the Act. This scheme clearly requires that a union must establish that it represents employees before it can acquire bargaining rights. The usual method of establishing representation is through the certification procedure set out in the Act. It should be noted that the Act ex-

pressly provides a special, and more expeditious, certification procedure for the construction industry. Bargaining rights may also be obtained through voluntary recognition but such bargaining rights may have to be tested under section 52 of the Act, and a determination may be made by the Board that the trade union was not entitled to represent the employees at the time the agreement was made. Given this underlying requirement of representation, the Board must conclude that the taking of a demand for voluntary recognition to an impasse at the bargaining table is conduct inconsistent with the scheme of the Act. While the parties may raise this matter in bargaining it is not an issue that should become the subject matter of a strike. Just as an employer cannot use its economic leverage to bargain out of established bargaining rights, a trade union cannot use its economic leverage to attempt to extend bargaining rights. Such demands, in the Board's view, must be removed from the bargaining table once a strike or lock-out is imminent, or in progress. If such demands are not removed at this time, the party pressing such demand must be held to have breached the duty to bargain in good faith.

19. Our conclusion is that the respondent in continuing its demand for extension of bargaining rights while the strike was proceeding has failed to meet the duty to bargain in good faith. This conclusion does not mean that the respondent is precluded from seeking voluntary recognition outside the bargaining table. Section 133(2), in our view, clearly does not prohibit a union from approaching individual employers for extended recognition at any time. In fact, section 132(4) expressly contemplates that bargaining rights will continue to be acquired through voluntary recognition, or certification, under the new scheme of provincial bargaining. Moreover, this conclusion should not be construed as questioning the respondent's desire to reach a provincial agreement. By finding that the respondent has not met the obligation to bargain in good faith the Board has simply clarified the scope of permissible bargaining.

20. The Board, therefore, declares that the respondent bargaining agent, by insisting upon the extension of bargaining rights during bargaining, has failed to meet the obligation set out in section 14 of the Act.

1995-77-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant), v. **Valley Bottling of Canada Ltd.**, (Respondent), v. Group of Employees, (Objectors).

Certification – Petition – Employer interviews with employees, proposed alteration of benefits, and circulation of printed material containing references to plant shutdowns prompted Board to reject petition

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *Gordon D. Reekie, R. Barrow and H. Buchanan for the applicant; C. E. Humphrey, Graham Pearce and J. Lavin for the respondent; Allan B. Clarke and Neil Stroud for the objectors.*

DECISION OF THE BOARD; August 31, 1978

1. The name "The Valley Bottling of Canada Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Valley Bottling of Canada Ltd."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Renfrew, Ontario, save and except supervisors, persons above the rank of supervisor, head shipper, production manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board further finds that there were 36 employees in the bargaining unit at the time the application was made. The applicant's membership evidence indicates that 24 of these employees had joined the trade union, which is adequate support for it to be certified without a representation vote, pursuant to section 7(2) of the Act. However, four handwritten statements of desire in opposition to the union were filed with the Board. Two bore individual signatures and, of the other two, one (which will be referred to as list No. 1) bore 18 signatures and the other (list No. 2) bore 15 signatures. No one appeared at the hearing who could give evidence to the Board regarding the origin of the individual statements and they are therefore disregarded.
6. Lists Nos. 1 and 2 have a total of 15 names which overlap with the applicant's membership evidence. There is no issue of timeliness in respect to these statements; therefore, if the Board finds them to be a voluntary expression of the true wishes of the employees who signed them, they would cause the Board to exercise its discretion under section 7(2) and order that a representation vote be held.
7. Mr. Allan B. Clarke appeared as spokesman for the objectors and he, together with Mr. Neil M. Stroud, who also appeared on behalf of the objectors, and Mr. Jack Freitag gave evidence as to the origin, circulation and filing of the two petitions with the Board. Mr. Clarke repairs and services vending machines for the respondent and Messrs. Stroud and Freitag are employed in the respondent's bottle shop. The two latter employees were shown as "foremen" on the schedules filed by the respondent with its reply. There was an initial challenge from the applicant based on its information that both employees were covered by the bargaining unit exclusion of supervisors. The Board heard the representation of the parties on this issue, following which the applicant did not pursue its challenge. On the evidence before the Board, it is satisfied that they are employees within the meaning of the Act who perform the same work as other employees on the bottling line and, in addition, perform quality control tests in respect to the bottling operation and also carry out lead hand responsibilities therein.
8. Mr. Clarke composed and wrote the heading on list No. 1 and Mr. Stroud did

likewise with respect to list No. 2. Mr. Clarke prepared his list shortly before noon on April 3rd in the room at work used by employees as a lunch room, having seen the Board's notice to employees about this application and having talked to some employees about it before 10:00 a.m. that day. Mr. Stroud was at home on vacation when he prepared list No. 2, also on the morning of April 3rd. He did so following a telephone message from Mr. Freitag. Each signed his own list and then immediately began to solicit signatures of other employees. This continued, with the help of Mr. Freitag in respect to list No. 1, during April 3rd, 4th and 5th. Mr. Stroud obtained some of the signatures on list No. 1 and Mr. Clarke did likewise regarding list No. 2. April 5th was the terminal date for the application and the date by which the statements either had to be delivered to the Board or sent by registered mail. They were filed by this latter means.

9. The Board has reviewed carefully all of the evidence about the circulation of the two lists and, in spite of some confusion in the testimony of these three witnesses as to precisely when the lists were transferred from one to the other of them, and in spite of the fact that the majority of the signatures were obtained on the respondent's premises, the Board is satisfied that the lists were circulated in such a way that they were always either in the possession of, or under the control of, the witnesses and the employer was unaware of their existence, with one exception. Before doing so, the last employee to sign (#P.20 on list No. 1) was overheard by Mr. Clarke (his evidence) speaking to Mr. Pearce about signing. Immediately after getting this signature, Mr. Clarke put all four statements in an envelope and went to the post office to mail them registered to the Board.

10. All three witnesses were forthright in their admissions that they were uncertain as to precisely when the lists transferred from one to another. As a result, signatures P.10, P.11 and P.19 on list No. 1 and P.32 on list No. 2 were not proven to the satisfaction of the Board. It considers signature P.20 discredited also and, altogether, this reduces the overlap with the membership evidence to 10. This is still enough to cause the Board to order a vote if it is satisfied that the petitions, in all of their circumstances, are a voluntary expression of the true wishes of the employees who signed them.

11. The applicant filed allegations with the Board that the respondent had distributed a letter to its employees, the wording of which violates sections 56 and 58(c) of The Labour Relations Act. Two employees, Mr. Terence Wright and Mr. Michael Walters, gave evidence on behalf of the applicant and Mr. Graham Pearce, General Manager of the respondent at Renfrew, gave evidence on its behalf in respect to the alleged letter and to other events relating to the origin and circulation of the petitions.

12. The following facts are established from Mr. Pearce's evidence. He held a meeting in the conference room of the plant starting between 11:15 a.m. and 11:30 a.m. on April 3rd. He decided to hold it as a result of a discussion immediately prior to the meeting with Mr. Enright, his Production Manager. It was attended by a maximum of 17 employees, or about half of the bargaining unit. His stated objective for the meeting was to give the employees an overview of the plant's current unit costs of production, to thank the employees for having done a good job in the past year and to tell them that the May 1st wage increase had been approved. Mr. Pearce, when discussing the main factors influencing production costs at the Renfrew plant, gave comparative data on the company's Valleyfield plant, where higher wage rates are paid, showing it to be a more cost efficient plant. He did refer to the union but not in terms where the word "union" was used. He used the term "situation"

or "pending situation" and his evidence is that he meant the possibility of unionization. Either following the meeting or the next day during the interviews referred to below, Mr. Pearce gave four employees copies of a single-page document (Exhibit #1 in evidence) which was the same list of 13 items used in the interviews with the following information added:

COMPARED WITH OTTAWA BOTTLING CONTRACT - NO BOTTLER IN ONTARIO PAYS THESE RATES - BOTTLER VS COCA-COLA COMPANY. BOTTLER HAS TO BUY CONCENTRATE & CANS FROM COKE WHO MAKES AN INITIAL PROFIT BEFORE OUR BOTTLING COMMENCES.

	CASES PRODUCED	PRODUCTION SALARIES COST
RENFREW	30,000 c/s MO.	\$20,000 .67¢
VALLEYFIELD	60,000 c/s MO.	\$30,000 .50¢
OTTAWA	100,000 c/s MO.	\$40,000 .40¢

WITH VALLEYFIELD OR OTTAWA SALARIES COST PER CASE WOULD BE SUCH THAT WE COULD PURCHASE FINISHED PRODUCT FROM OTTAWA OR MONTREAL CHEAPER.

VALLEY BOTTLING OF CANADA LTD.

CLOSED PRODUCTION IN CORNWALL
CLOSED DORION, QUEBEC
CLOSED SMITHS FALLS

Its stated purpose was to illustrate the difference in the cost per case of production salaries with other plants.

13. On April 4th Mr. Pearce held interviews with each available employee in which he discussed with the employee the benefits presently in force and those which would be coming into effect on May 1st. For this purpose he used a list dated April 3, 1978 headed "Benefits Now in Effect" and listing 13 items. From the list, he pointed out that the improved benefits were the maintenance of payment of 100% of the OHIP premium by picking up the recent premium increase; reducing from eight years to five years the service needed for three weeks vacation; the introduction of a company-paid pension plan and a 38-cent per hour wage increase.

14. The company's fiscal year is May 1st to April 30th. The Board accepts Mr. Pearce's evidence that wage increases and improvements in benefits are made in the Spring as a natural outcome of the annual budget preparation. As well, it accepts his evidence that, during his five years as General Manager, employees have been advised of their increases in individual interviews and that he has held meetings with groups of employees on an average of two per year and usually in the Spring and Fall to discuss the plant's performance, sales results and similar economic data.

15. The evidence of Messrs. Wright and Walters adds the following facts. The data with respect to unit costs of operation used by Mr. Pearce in the April 3rd meeting included references

- (a) to "quotas" which they understood to be performance targets for the Renfrew operation;
- (b) that the operations would be in difficulty if it fell short of these targets; and that
- (c) the "pending situation" might adversely affect the ability of the Renfrew operations to meet the targets.

The eventual result would be the closing down of production at Valley Bottling. While the two witnesses expressed this differently, their unprompted evidence, which withstood cross-examination, agrees on this point and on the fact that the comments were made halfway through the meeting.

16. With respect to the April 4th interviews with Mr. Pearce, their evidence corroborates the subject matter of the interviews and establishes that no reference or allusion to the union was made and there was no threat of withdrawing benefits if the union came in, and the improvements in working conditions were not made conditional on the union not coming in. They were not amongst the four employees who were given a copy of Exhibit #1, but were shown a copy by another employee at an employee meeting about the union on the night of April 4th. Both employees said that they had Exhibit #1 in mind when they signed the petition. According to Mr. Freitag's evidence, they signed the petition on April 5th. In Mr. Wright's case, he was approached the first time by Mr. Freitag right after the April 3rd meeting but declined. In Mr. Walters' case, he signed the petition because he thought the Renfrew plant would eventually close and was therefore fearful of his job.

17. The Board has held in numerous decisions that a natural suspicion attaches to a statement of desire which follows on the heels of a union organizing campaign. The Board must assure itself that employees who have first indicated support for a trade union and then indicate a desire to withdraw that support have undergone this change of mind by their free choice; that is, free of overt or subtle influences issuing from the employer against the union. The Board, in assuring the rights of employees under the Act to select or reject a trade union as bargaining agent, recognizes the opportunity that employees' dependence on the employer for their job security gives the employer to unduly influence their freedom of choice, intentionally or unintentionally.

18. The evidence before the Board displays the following sequence of events:

- (a) The Board's notice to employees is posted by 10:00 a.m. on April 3rd. It advises employees that any statements of desire must be filed by April 5th.
- (b) By 11:30 a.m. on April 3rd, Mr. Pearce is addressing a meeting of employees to give them an overview of the plant's costs of operation.

- (c) Immediately after the meeting, employees are being approached to sign petitions.
- (d) On April 4th the employees are interviewed and told what improvements in wages and benefits are being implemented. Not later than the same day, copies of Exhibit #1 are given to four employees and they are being shown to at least Messrs. Wright and Walters that evening at a meeting of employees at the home of an employee.
- (e) During April 4th and 5th, employees are continuing to sign the petitions.

19. Notwithstanding the fact that Mr. Pearce's statements in the April 3rd meeting were for the most part factual ones; the information in Exhibit #1 was factual and devoid of comment; no threats, promises or references to the union were made in the April 4th interviews; and that it was not unusual for him to have a meeting of employees at that time of year, the Board must consider the impact on the employees of the employer's actions in their entirety, including, in particular, their timing in relation to the events leading up to the filing of the petitions. The subjective evidence of Messrs. Wright and Walters is that they signed the petitions because of their concern, generated by Mr. Pearce's comments in the April 3rd meeting and the reference in Exhibit #1 to the three plants which have been closed by the company, that their jobs might be in jeopardy if the union became certified. The Board must decide whether this conclusion is supported by the objective evidence. The Board considers that the evidence and finding of fact cited herein do support their conclusions, particularly when taken into account with the following circumstances:

- (a) The sequence of the events listed in paragraph 18.
- (b) The employer's decision made the same morning that the Board's notice on the application was posted to hold a meeting immediately.
- (c) The fact that one purpose the employer had for the meeting was to give the employees an overview of the operation's current costs of production implies that the employer expected some result from that information.
- (d) Renfrew is a relatively small community with consequent limited alternative employment opportunities available.

Likewise, the Board considers that it is reasonable for it to draw the inference from the same source that other employees who signed the petitions may have responded the same way to these influences.

20. Therefore, the Board finds that Mr. Pearce's statements in the April 3rd meeting and the nature of the information on Exhibit #1, taken in the context of all of the events and circumstances referred to herein, were capable of unduly influencing employees to sign the petition and that the statement of desire does not represent a voluntary expression of the

true wishes of the employees. Consequently, the statement of desire can be given no weight and, accordingly, the Board will not exercise its discretion under section 7(2) of the Act to order a representation vote.

21. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 5, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.

0268-78-M Employees, (Applicant), v. **York University**, (Respondent), International Union, United Plant Guard Workers of America, and Local 1962, (Respondent Union).

S 95(2) – Whether named employees are guards – No dispute between parties to collective agreement – Reference launched by other employees in effort to have persons excluded from unit to resolve internal union dispute – Board holding no reference possible in these circumstances

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members E. Boyer and F. W. Murray.

APPEARANCES: *Robin B. Cumine and Harry Nickelson for the applicant; Elizabeth Stewart and D. B. Dimitry for the respondent; Raj Anand and Watson Cook for the respondent union.*

DECISION OF THE BOARD; August 25, 1978

1. This is an application by three employees seeking a decision by the Board pursuant to section 95(2) of The Labour Relations Act in respect to whether certain persons in the employ of York University are “guards” within the meaning of the Act.

2. The respondent University and the respondent Union are parties to a collective agreement which will expire on October 31, 1978, and which covers a bargaining unit including the individual applicants. The bargaining unit is the same as that described in a certificate issued by this Board on August 20, 1973 at which time the respondent union replaced the then incumbent trade union as bargaining agent.

3. The applicants are employed within the bargaining unit under a classification of “Senior Security Officers”: there are two other classifications within the bargaining unit, namely, “Security Officer” and “Parking Attendant and Watchman”. There is no dispute that all three such classifications have been included in the bargaining unit throughout the period of the bargaining relationship, although there has probably been an increase in the number of persons included as “Parking Attendants” in proportion to those in other classifi-

cations. It is this shift in comparative numbers, together with an apprehension of further shifts in the same direction, which underlies the bringing of this application seeking a decision of this Board that these "Parking Attendants" do not qualify as guards under The Labour Relations Act.

4. At the hearing of this matter preliminary objection was taken by both respondents that the applicants have no status to bring this application. Reference was made to: *In re Vera Elkington*, 61 CLLC ¶16,198 and *Indusmin*, [1977] OLRB Rep. Sept. 552 as authority for the proposition that access to section 95(2) of the Act is restricted to parties to a collective agreement. The applicants argue that the case cited should be considered as authority only for the proposition that section 95(2) is not available as a substitute for grievance procedure which is not this case; and that further since section 95(2) does not explicitly delimit the category of persons who may seek access through it, the Board must find that individuals such as the applicants are proper persons to launch an application.

5. The issue to be decided by the Board is whether a question has arisen during the operation of the collective agreement as to whether certain persons are guards. If no such question has arisen then there can be no referral to the Board under section 95(2). Certainly there is no question arising *between the parties* to the collective agreement as to whether any of the persons are guards and there is no dispute but that such persons – irrespective of their job status – are clearly and unambiguously covered by the collective agreement. Further, it is clear to us, (and we believe to the parties before us) that even if the Board were to make a finding that such persons were not "guards" within the Act, such finding would not result in disturbing any of the rights or duties flowing from the current collective agreement or in any way change the administration of the current agreement during its remaining period of operation. The strictures imposed on the Board by sections 11 and 12 of the Act in respect to its powers to certify a trade union are similar. However the Legislature saw fit, in respect to a trade union engaging in activities defined in section 12, to take the further step in section 40 of the Act to declare that any agreement entered into shall not be treated as a collective agreement under the Act. The employer is entitled, but not required, to enter into an agreement covering a mixed unit of guards and non-guards. The same kind of statutory voiding of the agreement in the event of a contravention of section 12 is not provided in respect to a trade union which the Board is prohibited from certifying under section 11. We must, therefore, assume that even if we were to make the finding sought by the applicants the agreement would continue to subsist and be applied. The applicant counters that the time is approaching when the collective agreement will be subject to re-negotiation and because of the strictures laid on the Board in section 11 of the Act it is essential that the applicants know whether their bargaining agent is a trade union such as the Board would certify as a bargaining agent to represent guards. It is argued that section 11 may justify the employer in refusing to bargain with a bargaining unit that includes both guards and non-guards. However, the employer has never refused to bargain with the respondent union in respect of the existing unit, nor is there any suggestion that it intends to do so at the expiry of the subsisting agreement. The bargaining relationship extends over several collective agreements and no such objection has ever been made.

6. In our view there must be a present question arising between the parties to the collective bargaining relationship before there can be a section 95(2) referral. Certainly, it is clear that for a question to arise "in the course of bargaining for a collective agreement" it would be necessary for such question to be raised in the "bargaining forum" and must

therefore be a question between the parties to that bargaining relationship i.e. the bargaining agent and the employer: we are of the opinion, that it is no less implicit in the language of the section that the question which must arise during the period of operation of the agreement must also be a question between the parties to that agreement.

7. It is obvious that there is disagreement amongst various members of the union as to whom their union should represent. That is a question which has arisen solely between members, not between the employer and the bargaining agent, and does not in any way affect the operation of the present collective agreement. We do not believe that the Legislature could have intended that an internal dispute amongst the members of one of the parties to the collective relationship, even though it arises within a time period during which a collective agreement is operating, required a resolution by this Board when such resolution is wholly ineffectual to alter or in any way affect or even to clarify the rights of any person now covered by the collective agreement. Such a decision resolves nothing other than the internal difference of opinion of members which would be best resolved internally. In our view, section 95(2) of the Act is intended to promote stability in labour relations by making available a forum for the settlement of particular questions where they are interfering with the general collective bargaining relationship.

8. Nor do we think that the heavy onus imposed on the Board through section 11 of the Act extends to create a policing responsibility on the Board to monitor through section 95(2) mutual agreements by the parties in respect to the bargaining unit. Such mutual agreements are within the prerogatives of the parties and are entered into by them subject to the Board finding in a future representation proceeding that they are such as to call section 11 into play. It is only in those cases in which there is no mutual agreement between the parties and a question therefore arises that the Board may decide the issue. Given the fact that at the root section 11 was the intention of the Legislature to preclude any conflict of interest in persons employed to protect the property of the employer, one can assume that the employer is unlikely to agree to any bargaining unit applications which will lessen his ability to have his property protected. The likelihood of a mutual agreement subverting the purpose of section 11 is slight indeed.

9. It is our finding that no such question has arisen between the parties and that an application under section 95(2) cannot be entertained.

10. While that finding disposes of the matter before us, the Board feels it should comment on the applicants argument that it is entitled to know the status of persons which may have an impact on the capability of the bargaining agent to represent guards. In our view it is premature to raise that issue at this time, for the reasons previously cited, since the trade union's right to be certified as bargaining agent or to bargain on behalf of the subject employees is not now before the Board.

11. The application is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1978

BARGAINING AGENTS CERTIFIED DURING JULY

No Vote Conducted

1808-77-R: United Steelworkers of America (Applicant) v. Standard Oxygen (Ontario) Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (4 employees in the unit).

1879-77-R: Canadian Union of Public Employees (Applicant) v. Strathaven Nursing Home Limited (Respondent).

Unit: "all employees of the respondent at its Strathaven Nursing Home at Bowmanville, save and except professional medical staff (including registered nurses and graduate nurses), supervisors (house-keeping, laundry and kitchen), office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (80 employees in the unit). (*Having regard to the agreement of the parties*).

0037-78-R: Local 604, Hotel & Restaurant Employees & Bartenders International Union, A F of L, CIO, & CLC Peterborough, Ontario (Applicant) v. Churchill Restaurant Limited (Respondent).

Unit #1: "all employees of the respondent employed at its premises at 394 George Street North, Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, office and bookkeeping staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

0099-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 785 and 2041, (Applicant) v. Savioli and Morgan Co. Limited, carrying on business as Industrial Lathing and Plastering Co. (Respondent) v. The Wood, Wire and Metal Lathers' International Union, Local 562 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*clarity note – see Report of full decision (1978) OLRB Rep. July*).

0151-78-R: Ontario Public Service Employees Union (Applicant) v. The Peterborough Civic Hospital (Respondent) v. Employees (Objectors).

Unit #1: "all office and clerical employees employed by the respondent in the City of Peterborough, save and except executive director, assistant executive director, director of personnel, supervisors, persons above the rank of supervisor, secretary to executive director, secretary to assistant executive director, secretary to director of personnel, office manager (psychiatry), personnel officer, secretary to director of hospital and financial services, medical record librarian and analyst, supervisor – medical stenographers, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements." (92 employees in the unit).

Unit #2: "all office and clerical employees regularly employed by the respondent in the City of Peterborough for not more than twenty-four hours per week, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and persons covered by subsisting collective agreements." (43 employees in the unit). (*Having regard to the agreement of the parties*).

0171-78-R: Canadian Union of Public Employees (Applicant) v. VS Services Ltd. (Respondent).

Unit #1: "all employees of VS Services Ltd. at the Cobourg General Hospital in Cobourg, Ontario, save and except office staff, supervisors, persons regularly employed 24 hours or less and students employed during the summer vacation period, manager, and persons above the rank of manager." (12 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all persons regularly employed for 24 hours per week or less and all students employed during the summer vacation period in the employ of VS Services Ltd. at the Cobourg General Hospital in Cobourg, Ontario." (10 employees in the unit). (*Having regard to the agreement of the parties*).

0286-78-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Manitou Mechanical Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit). (*Having regard to the agreement of the parties*).

0334-78-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC: (Applicant) v. Canada Dry Bottling Company (Kingston) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Kingston, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*).

0363-78-R: International Molders and Allied Workers Union (Applicant) v. Accurcast Die Casting Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (81 employees in the unit). (*Having regard to the agreement of the parties*).

0468-78-R: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC (Applicant) v. ITEA Canada Ltd. (Respondent).

Unit: "all employees of the respondent in the City of Cornwall, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (35 employees in the unit). (*Having regard to the agreement of the parties*).

0502-78-R: Christian Labour Association of Canada, Local #150 (Applicant) v. Meadowbrook Homes of St. Catharines Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices and constructions labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0506-78-R: Local Union 636 International Brotherhood of Electrical Workers AFL - CIO - CLC (Applicant) v. The Municipality of the Town of Napanee (Respondent).

Unit: "all employees in the respondent's public works department save and except office, clerical and technical staff and persons regularly employed for not more than twenty-four hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0508-78-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. H. Boehmers Limited (Respondent).

Unit: "all employees of the respondent working at or out of Orangeville, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0518-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 1747, 3227 and 3233, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kondo Contract Interiors Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0519-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 1747, 3227 and 3233, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. McCullough Sports Installations Company Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0524-78-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Livingston Mutual Warehouse Limited (Respondent) v. International Woodworkers of America (Intervener).

Unit: "all employees of the respondent at 260 Brimley Road and 1001 Ellesmere Road in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, dispatchers,

checkers, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods." (35 employees in the unit). (*Having regard to the representations before it*).

0529-78-R: Canadian Union of Public Employees (Applicant) v. Kent County Board of Education (Respondent) v. Ontario Teachers' Federation (Intervener).

Unit: "all office, clerical and technical employees of the respondent in the County of Kent, save and except secretary to the Director of Education, secretary to the Executive Assistant, secretary to the Superintendents of Schools, secretary to the Superintendent of Business, secretary to the Director of Computer and Personnel Services, supportive service staff, Indian education workers and persons covered by subsisting collective agreements." (102 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1978) OLRB Rep. July).

0531-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Tristan Incorporated (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0544-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Green-spoon Bros., Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

0557-78-R: Service Employees International Union, Local 183 AF of L., C.I.O., C.L.C. (Applicant) v. Central Park Lodges of Canada (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisors or foremen, office staff and persons covered by subsisting agreement with Local 183 SEIU." (31 employees in the unit). (*Having regard to the agreement of the parties*).

0558-78-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Christie Park Nursing Home (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements." (16 employees in the unit). (*Having regard to the agreement of the parties*).

0559-78-R: Ontario Nurses' Association (Applicant) v. Tullamore Nursing Home (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at Tullamore Nursing Home, Brampton, save and except the Director of Nursing and persons above the rank of Director of Nursing." (11 employees in the unit).

0563-78-R: Graphic Arts International Union, Local 542 (Applicant) v. Kerr-Progress Printing Limited (Respondent) v. Gordon Willard (Intervener).

Unit: "all bindery workers in the employ of the respondent in the Regional Municipality of Cambridge, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0570-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Toronto College Street Centre Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0585-78-R: United Steelworkers of America (Applicant) v. Vincent Steel & Service Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (27 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. July).

0586-78-R: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC (Applicant) v. Filterfab Incorporated (Respondent).

Unit: "all employees of the respondent at its plant in St. Catharines, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed for the summer vacation period." (18 employees in the unit). (*Having regard to the agreement of the parties*).

0588-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ryder Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0589-78-R: Canadian Union of Public Employees (Applicant) v. Brampton Caledon Association for the Mentally Retarded (Respondent).

Unit: "all residence, townhouse and apartment employees of the respondent in Brampton, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (10 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. July).

0590-78-R: Retail Clerks International Union, Local 233F, Chartered by the Retail Clerks International Union (Applicant) v. J. H. McNairn Limited (Respondent).

Unit: "all employees of the respondent in the Town of Whitby, Ontario, in the Region of Durham, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period." (21 employees in the unit). (*Having regard for the agreement of the parties*).

0593-78-R: Teamsters Union Local No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Aylmer Foods Warehousing Limited (Respondent).

Unit: "all office employees of the respondent employed at its warehouse in the Municipality of Metropolitan Toronto save and except supervisors, those above the rank of supervisor, sales staff, secretary to the general manager, students employed during the school vacation period and persons covered by a subsisting collective agreement between the respondent and the applicant for its warehouse operations." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0596-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 1747, 3227, 3233, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Anek General Building Contractors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0602-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Len Ariss and Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0603-78-R: Canadian Union of Public Employees (Applicant) v. Toronto Western Hospital (Respondent).

Unit: "all employees of the respondent at its hospital at 399 Bathurst Street, in the City of Toronto, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods, save and except professional staff, medical staff, graduate nursing staff, graduate pharmacists, graduate dieticians, technical personnel, students on a course leading to employment in one of the aforementioned exempt categories, supervisors, persons above the rank of supervisor, clerical staff and persons covered by subsisting collective agreements." (92 employees in the unit).

0604-78-R: Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the United Counties of Stormont, Dundas & Glengarry (Respondent).

Unit: "all employees of the Children's Aid Society of the United Counties of Stormont, Dundas & Glengarry, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary, Bookkeeper, and students employed in the school vacation period." (21 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. July).

0611-78-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Carleton Formwork (Ontario) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0614-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. P. K. Johannsen Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0615-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Thornedale Construction Reg'd (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0616-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Chatham Painting and Decorating (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen, and persons above the rank of non-working foreman." (9 employees in the unit).

0619-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Skyview Forming & Masonry Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0621-78-R: Labourers International Union of North America, Local 493 (Applicant) v. Pitts Engineering Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

0622-78-R: Labourers International Union of North America, Local 493 (Applicant) v. Bot Construction (Canada) Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of foreman." (39 employees in the unit).

0625-78-R: Local Union 1674 International Brotherhood of Electrical Workers (Applicant) v. Canadian Niagara Power Company, Limited (Respondent).

Unit: "all office, clerical and planning department employees of the respondent in Niagara Falls and Fort Erie, save and except supervisors, persons above the rank of supervisor, accountant, secretary to the general manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in the unit). (*Having regard to the representations before it, and to the agreement of the parties*).

0627-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. John Rae and Sons Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0628-78-R: Labourers' International Union of North America Local 1081 (Applicant) v. Begg & Dagle Store and Office Interiors (Respondents).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0635-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. B & K Taping and Spraying Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices, painters and painters' apprentices, plasterers and plasterers' apprentices and construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*). (*clarity note* – see Report of full decision (1978) OLRB Rep. July).

0636-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Pressed Steel Products (Windsor) Ltd. (Respondent).

Unit: "all employees of the respondent in Windsor, save and except foremen, persons above the rank of foreman, office and sales staff." (12 employees in the unit).

0637-78-R: Hotel, Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant & Bartenders International Union (AFL-CIO-CLC) (Applicant) v. Wandlyn Motels Limited, operating the Wandlyn Viscount Motor Hotel (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, regularly employed for not more than 20 hours per week, save and except those employees covered by the subsisting collective agreement between the applicant and the respondent." (59 employees in the unit). (*Having regard to the agreement of the parties*).

0652-78-R: United Brotherhood of Carpenters and Joiners of America Local 38 (Applicant) v. Len Ariss (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional

Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0678-78-R: Canadian Transportation Workers’ Union No. 166 National Council of Canadian Labour (Applicant) v. Maitland Redi-Mix Concrete Products Limited (Respondent).

Unit: “all employees of the respondent working in and out of its plants at Tiverton, Teeswater and Wingham, save and except foremen, persons above the rank of foreman, salesmen and office staff.” (20 employees in the unit).

0679-78-R: International Brotherhood of Electrical Workers, Local Union 1590 (Applicant) v. REF Automation Limited (Respondent).

Unit: “all employees of the respondent at its plant in Weston, save and except foremen, persons above the rank of foreman, office, sales staff and security guards.” (32 employees in the unit). (*Having regard to the agreement of the parties*).

0709-78-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Homeco Investments Limited (Respondent).

Unit: “all construction labourers employed on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1194-77-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Marini Bros. Plastering (1976) Co. Ltd. (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association Local 298 (Intervener).

Unit: “all plasterers and plasterers’ apprentices employed by the respondent on residential building projects in and out of the City of Hamilton, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

Number of names of persons on revised voters’ list		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	

1197-77-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Santucci Brothers (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association Local 298 (Intervener).

Unit: “all plasterers and plasterers’ apprentices employed by the respondent on residential building projects in and out of the City of Hamilton, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

Number of persons who cast ballots		5
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener	1	

1841-77-R: Canadian Paperworkers' Union (Applicant) v. The Ontario Paper Company Limited (Respondent) v. The Canadian Union of Operating Engineers and General Workers (Intervener).

Unit: "all stationary engineers and persons primarily engaged as their helpers employed in the Steam Plant of the Ontario Paper Company Limited at Thorold, save and except supervisory foremen and those above the rank of supervisory foreman." (26 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant	14	
Number of ballots marked in favour of intervener	11	

1937-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Chemello Construction Ltd. (Respondent) v. The General Contractors' Section of The Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Certified*).
- and -

2018-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Chemello Construction Ltd. (Respondent) v. The General Contractors' Section of The Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Dismissed*).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicants, Labourers' International Union of North America, Local 506	3	
Labourers' International Union of North America, Local 183	1	
Number of ballots marked in favour of intervener #2 Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada	1	

Applications Certified Subsequent to Post-Hearing Vote

1880-76-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Dufferin Aggregates A Division of Dufferin Materials & Construction Ltd. (Respondent).

Unit: "all employees engaged as drivers working at or out of the respondent's quarry at Milton, save and except dispatcher, persons above the rank of dispatcher, office staff and persons represented by virtue of any subsisting collective agreements." (45 employees in the unit).

Number of names of persons on list as originally prepared by employer		45
Number of persons who cast ballots		40
Number of ballots marked in favour of applicant	40	
Number of ballots marked against applicant	0	

2148-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. The Canada Gunit Co. Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association Local 298 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	0	

0037-78-R: Local 604, Hotel & Restaurant Employees & Bartenders International Union, A.F. of L., CIO, & CLC Peterborough, Ontario (Applicant) v. Churchill Restaurant Limited (Respondent).

Unit #2: "all employees of the respondent regularly employed at its premises at 394 George Street North, Peterborough, Ontario for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor, office and book-keeping staff and persons covered by the certificate of the Board issued in respect of the full-time employees of the respondent." (4 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		3
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	1	

(Bargaining Unit #1 — See Bargaining Units Certified — No Vote Conducted).

0294-78-R: Service Employees Union, Local 210 affiliated with Service Employees International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Clinton Public Hospital (Respondent).

Unit: "all employees of Clinton Public Hospital, at Clinton, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, technical personnel, office and clerical staff." (27 employees in the unit).

Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	5	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1875-77-R: Canadian Food and Associated Services Union (Applicant) v. Federated Building Maintenance Company Limited (Respondent). (207 employees).

2016-77-R: Teamsters Local Union No. 349, Aggregate Dump Truck Haulers and Allied Drivers of Ontario (Applicant) v. Canada Crushed Stone, A Division of Steetley Industries (Respondent) v. United Steelworkers of America (Intervener).

- and -

2017-77-R: Teamsters Local Union No. 349, Aggregate Dump Truck Haulers and Allied Drivers of Ontario (Applicant) v. A. Cupido Haulage Ltd. (Respondent). (13 employees).

0021-78-R: United Brotherhood of Carpenters and Joiners of America – Millworkers Local #802 (Applicant) v. Beaver Lumber Company Limited (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen and department managers and persons above the rank of foreman and department manager, and employees covered by the collective agreement between the applicant and the respondent." (25 employees in the unit).

(Bargaining Unit #1 – See Certification Dismissed Subsequently to Post-Hearing Vote).

0330-78-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Erie & Huron Beverages Limited (Respondent) v. Group of Employees (Objectors). (48 employees).

0419-78-R: United Cement, Lime and Gypsum Workers International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. United Concrete Products Limited (Respondent). (9 employees).

0422-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Cooper Construction Company Limited (Respondent) v. Local 298 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener). (2 employees).

0545-78-R: International Brotherhood of Painters & Allied Trades Local 1891 (Applicant) v. Cara Drywall Services (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48 (Intervener). (2 employees).

Certification Dismissed Subsequently to Pre-Hearing Vote

1196-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. C. Chewter & Son (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener).

Voting Constituency: "All employees of the respondent, including independent contractors, employed on residential construction in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees).

Number of persons on revised voters' list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	0	

0008-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Diplock Durable Floor Co. Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots		17
Ballots segregated and not counted	17	
Number of segregated ballots cast by persons whose name appear on voters' list	10	
Number of segregated ballots cast by persons whose name do not appear on voters' list (<i>Ballot Box Sealed</i>)	7	

0150-78-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Simkon Contracting Ltd. Simcoe Mechanical Contracting Ltd. (Respondents) v. Chritian Labour Association of Canada (Intervener).

Voting Constituency: "All plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Simcoe Mechanical Contracting Ltd. in Simcoe County, District of Muskoka, Townships of Rama, Mara and Thorah, in the County of Ontario and in the Townships of Carling, Ferguson, McDougall, McKellar, Christie, Foley, Conger and Humphrey, in the District of Parry Sound, including all of the Municipalities contained therein, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	3	

0432-78-R: Ontario Public Service Employees Union (Applicant) Lady Isabelle Nursing Home Ltd. & Sir George Manor (Respondent).

Voting Constituency: "All employees of Lady Isabelle Nursing Home Ltd. employed at its nursing home in Trout Creek, save and except Administrator, Assistant Administrator and Director of Nursing." (45 employees).

Number of names of persons on revised voters' list		50
Number of persons who cast ballots	35	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	29	

Certification Dismissed Subsequent to Post-Hearing Vote

1323-77-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. 3595 Keele Ltd., carrying on business as Elm Tree Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except registered nurses, supervisors, persons above the rank of supervisors, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (76 employees in the unit).

Number of names of persons on revised voters' list		87
Number of persons who cast ballots	81	
Number of ballots marked in favour of applicant	40	
Number of ballots marked against applicant	41	

1776-77-R: Hotel & Restaurant Employees Union, Local 756, St. Catharines, Ontario (Applicant) v. The Explorer Inns, Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Explorer Inn (Jarvis) save and except persons above the rank of Manager, Manager, Assistant Managers, Supervisors and Assistant Supervisors." (54 employees in the unit).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots	44	
Number of ballots marked in favour of the applicant	4	
Number of ballots marked against applicant	40	

0021-78-R: United Brotherhood of Carpenters and Joiners of America – Millworkers Local #802 (Applicant) v. Beaver Lumber Company Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Windsor, save and except foremen and department managers and persons above the rank of foreman and department manager, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by the collective agreement between the applicant and the respondent." (26 employees in the unit).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	14	

(Bargaining Unit #2 – See Application For Certification Dismissed – No Vote Conducted).

0245-78-R: Ontario Nurses' Association (Applicant) v. Extendicare Ltd. (North York Nursing Home) (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity by Extendicare Ltd., at its North York Nursing Home, save and except assistant director of nursing, those above the rank of assistant director of nursing and those regularly employed for not more than twenty-four hours per week." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	7	

0313-78-R: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all meat department employees of the respondent in its stores in the Municipality of Mississauga, save and except persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and, pending the resolution of the status of meat managers, excluding as well meat managers." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots		17
Ballots segregated and not counted	3	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	12	

0349-78-R: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all meat department employees of the respondent in its stores in the Municipality of Brampton, save and except persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and, pending the resolution of the status of the meat managers, excluding as well as managers." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots		13
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	7	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0500-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Art Ellis Construction Co. Ltd. (Respondent) v. Group of Employees (Intervener). (7 employees).

0507-78-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent). (17 employees).

0617-78-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Warren Bitulithic Ltd. (Respondent). (5 employees).

0618-78-R: The United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. A.F. & W. Systems Ltd. (Respondent). (2 employees).

0638-78-R: Service Employees Union, Local 298 (Applicant) v. Modern Building Cleaning Division (Respondent). (60 employees).

0641-78-R: Ontario Public Service Employees Union (Applicant) v. Sault Ste. Marie General Hospital (Respondent) v. Group of Employees (Objectors). (44 employees).

0653-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ideal Plastering Co. Ltd. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union 345 (Intervener). (3 employees).

0654-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Star Plasterers (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union 345 (Intervener). (2 employees).

0655-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. John M. M. Troup Ltd. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union 345 (Intervener). (3 employees).

0656-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. J. C. McGregor Ltd. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union 345 (Intervener). (2 employees).

0662-78-R: United Brotherhood of Carpenters & Joiners of America Local Union 1669 (Applicant) v. Ellis-Don Limited (Respondent). (7 employees).

0680-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Jamieson Drywall (Respondent). (2 employees).

APPLICATION UNDER SECTION 1(4)

0220-78-R: Christian Labour Association of Canada (Applicant) v. Mortlock Construction (1963) Limited Mortlock Construction (1978) Limited A. Mortlock Enterprises Limited (Respondents). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1359-77-R: Marilyn Ducharme (Applicant) v. Teamsters Union Local 938 (Respondent) v. Sudbury & District Society for Prevention of Cruelty to Animals (Intervener). (4 employees). (*Granted*).

0241-78-R: Martin Balodis (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent). (*Granted*).

Unit: "all electricians and electricians' apprentices in the employ of Kroman's Electric Ltd., in Metropolitan Toronto, the Regional Municipality of York, and the County of Peel, the Townships of Esqueving and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	3	

0428-78-R: Kitchener-Waterloo Stockyards Limited (Applicant) v. Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Respondent). (5 employees). (*Granted*).

0533-78-R: Paul Amlinger, on behalf of a group of employees (Applicant) v. Canadian Union of United Brewery-Flour-Cereal-Soft Drink and Distillery Workers (Respondent) v. Kitchener Beverages Limited (Intervener). (41 employees). (*Withdrawn*).

0605-78-R: William Mahoney (Applicant) v. Union of Can. Retail Employees C.L.C. (Respondent) v. Rose & LaFlamme Limited (Intervener). (9 employees). (*Dismissed*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0591-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. Peerless Plastics Limited (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0587-78-U: Blue-Con Construction Inc. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent). (*Dismissed*).

0642-78-U: Vamcos Masonry Contractors (Applicant) v. The Toronto Building and Construction Trades Council and Ironworkers Local 721 (Respondents). (*Withdrawn*).

0643-78-U: Vamcos Masonry Contractors (Applicant) v. The Toronto Building and Construction Trades Council and Ironworkers, Local 721 (Respondents). (*Withdrawn*).

0658-78-U: The Ontario-Minnesota Pulp and Paper Company Limited (Applicant) v. The Lumber & Sawmill Workers' Union, Local 2693; Tulio Mior, et al. (Respondents). (*Granted*).

0667-78-U: Donline Haulage Inc. (Applicant) v. Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; J. White; Kenneth Lester, Raymond Gendron et al (See Schedule "A" attached hereto) (Respondents). (*Granted*).

0723-78-U: Upper Yonge Limited (Applicant) v. The Toronto Building and Construction Trades Council, Dave Johnson (Respondents). (*Withdrawn*).

0735-78-U: Cities Service Chemicals Ltd., Columbian Division (Hamilton Plant) (Applicant) v. Teamsters Local Union No. 879, Fred Ellis, James E. Shaw, Norman A. Demers, Milan N. Ferko, James M. Lewis, Harold J. Lynch, et al (See Appendix "A") (Respondents). (*Withdrawn*).

0751-78-U: Saltfleet Construction Limited (Applicant) v. Tom Fenwick and Norman Hawe (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1934-77-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Fleck Manufacturing Company, Grant Turner, Bill McIntyre & Jack Riddell (Respondents). (*Granted*).

0549-78-U: Cloverleaf Hotel Limited known as Cloverleaf Hotel (Applicant) v. International Beverage Dispensers' and Bartenders Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Respondent). (*Withdrawn*).

0671-78-U: Labourers' International Union of North America, Local 183 (Applicant) v. 7-11 Pools & Metalfab Limited (Respondent). (*Withdrawn*)

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1117-76-U: Retail Clerks International Association (Complainant) v. Super X Drugs Limited (Respondent). (*Dismissed*).

0920-77-U: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Flamboro Downs Holdings Ltd. (Respondent).

1029-77-U: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Flamboro Downs Holdings Ltd. (Respondent). (*Granted*).

1812-77-U: United Steelworkers of America (Complainant) v. Arnold-Nasco Limited (Respondent). (*Granted*).

1835-77-U: Toronto Typographical Union No. 91 (Complainant) v. The Daily Times (Respondent). (*Dismissed*).

1915-77-U: Retail Clerks Union Local 206 (Complainant) v. Gordons Markets a Division of Zehrmart Limited (Respondent). (*Granted*).

2020-77-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Kenneth R. Green, carrying on business as Greens Ambulance (Respondent). (*Dismissed*).

0028-78-U: Ontario Nurses' Association (Complainant) v. Elgin-St. Thomas Health Unit (Respondent). (*Withdrawn*).

0143-78-U: Office and Professional Employees International Union, Local No. 81 (Complainant) v. Canadian Car Division, Hawker Siddeley Canada Ltd. (Respondent). (*Withdrawn*).

0145-78-U: Wakefield Harper (Complainant) v. The Civic Institute of Professional Personnel (Respondent). (*Dismissed*).

0186-78-U: Local 1976, Pharmacists and Professional Employees Assoc. chartered by Retail Clerks International Union, CLC, AFL-CIO (Complainant) v. Hillsdale Nursing Home (Respondent). (*Dismissed*).

0326-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. York-Hanover Developments Ltd., John Holgate, Gabor Preczner, Christine Swabey, R. Bendak, G. Deroche, K. Dechamps, W. Walker, and Evangelos Marantos, carrying on business as Perfect Metro Cleaners (Respondents). (*Granted*).

0447-78-U: Canadian Union of Public Employees (Complainant) v. Scarborough Centenary Hospital Association (Respondent).

- and -

0496-78-U: Ontario Nurses' Association (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Granted*).

0488-78-U: Canadian Union of Public Employees (Complainant) v. Art Gallery of Ontario (Respondent). (*Terminated*).

0494-78-U: The United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Complainant) v. Vroom Developments (Central) Limited (Respondent). (*Withdrawn*).

0495-78-U: Toronto Typographical Union No. 91 (Complainant) v. The Daily Times (Respondent). (*Terminated*).

0512-78-U: Gino Donatucci (Complainant) v. The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Respondent). (*Withdrawn*).

0525-78-U: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Livingston Mutual Warehouse Limited (Respondent). (*Withdrawn*).

0534-78-U: Ethel Ellen Chinnery (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 2654 and K-D Manufacturing Company Limited (Respondents). (*Withdrawn*).

0547-78-U: Cloverleaf Hotel Limited known as Cloverleaf Hotel (Complainant) v. Peter Patrikios, John Green, and Neil Julien (Respondent). (*Withdrawn*).

0548-78-U: Cloverleaf Hotel Limited, known as Cloverleaf Hotel (Complainant) v. International Beverage Dispensers' and Bartenders Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Respondent). (*Withdrawn*).

0564-78-U: Spiros Tsiopoulos (Complainant) v. Local Union No. 232, United Rubber, Cork, Linoleum and Plastic Workers of America (Respondent). (*Withdrawn*).

0565-78-U: Canadian Union of Public Employees (Complainant) v. Art Gallery of Ontario (Respondent). (*Withdrawn*).

0582-78-U: The United Brotherhood of Carpenters and Joiners of America (Complainant) v. M. Sullivan and Son Limited (Respondent). (*Dismissed*).

0583-78-U: Ontario Nurses' Association (Complainant) v. Altamont Nursing Home Limited (Respondent). (*Withdrawn*).

0609-78-U: Canadian Union of Public Employees (Complainant) v. Rest Haven (Private Hospital) (Respondent). (*Withdrawn*).

0610-78-U: Canadian Union of Public Employees (Complainant) v. Rest Haven (Private Hospital) (Respondent). (*Withdrawn*).

0630-78-U: Canadian Union of Public Employees (Complainant) v. St. Peter's Hospital, Hamilton, Ont. (Respondent). (*Withdrawn*).

0639-78-U: Brian Lathangue (Complainant) v. Excel Metal Craft Ltd. and U.A.W. (Respondents). (*Withdrawn*).

0674-78-U: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chau-

ffeurs, Warehousemen & Helpers of America (Complainant) v. Warren Bitulithic Ltd. (Respondent). (*Withdrawn*).

0707-78-U: United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency (Complainant) v. United Brotherhood of Carpenters & Joiners of America, The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America, Local 38 of the United Brotherhood of Carpenters & Joiners of America, Art Varty and Jen-Mar Construction Limited (Respondents). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0673-78-M: Merit Automotive Products Limited (Applicant) v. United Steelworkers of America (Respondent). (*Granted*).

0687-78-M: Wilson's Truck Lines Limited (Applicant) v. Canadian Union of Drivers and General Workers (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 55

1122-77-R: Local 550, Canadian Food and Allied Workers, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America (Applicant) v. Peninsula Warehouse and Storage Limited (Respondent). v. Culverhouse Foods Incorporated (Intervener). (*Granted*).

1900-77-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited, Windsor Branch and Store at Your Door Distributors (Windsor) Inc. (Respondents). (*Terminated*).

1916-77-R: Retail Clerks Union Local 206 (Applicant) v. Gordons Markets a Division of Zehrmart Limited (Respondent). (*Granted*).

0219-78-R: Christian Labour Association of Canada (Applicant) v. Mortlock Construction (1963) Limited Mortlock Construction (1978) Limited A. Mortlock Enterprises Limited (Respondents). (*Granted*).

0289-78-R: The Wood, Wire and Metal Lathers' International Union, Local 562 (Applicant) v. Speed Drywall Limited and Industrial Lathing and Plastering Co. (Respondents). v. The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 785 and 2041 (Intervener). (*Withdrawn*).

0471-78-R: Service Employees Union Local 183 (Applicant) v. Crothall Services Limited, V.S. Services Ltd. and Trenton Memorial Hospital (Respondents). v. Trenton Memorial Hospital (Intervener). (*Withdrawn*).

0629-78-R: Hotel & Motel and Restaurant Employees' Union, Local 893, Atikokan, Ontario, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Valenca Restaurant (Respondent). (*Granted*).

APPLICATION FOR THE SCHOOL BOARDS AND TEACHERS COLLECTIVE NEGOTIATIONS ACT, 1975 UNDER SECTION 68

0550-78-U: The Board of Education for the City of Windsor (Applicant) v. The Ontario Secondary School Teachers' Federation, District 1 (O.S.S.T.F. District 1) (Respondent). (*Dismissed*).

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0832-77-JD: The Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local Union No. 124 Ottawa-Hull (Complainant) v. Eastern Armoured Floor Ltd., The Labourers' International Union of North America and George Harrop, representative (Respondents). (*Granted*).

APPLICATIONS FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

1657-77-M: Ontario Public Service Employees Union (Applicant) v. St. Lawrence College of Applied Arts & Technology (Respondent). (*Granted*).

0584-78-M: Ontario Public Service Employees Union (Applicant) v. St. Clair College of Applied Arts & Technology (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1343-77-M: Canadian Union of Public Employees Local 1052 (Applicant) v. The Hydro-Electric Commission of the City of Sudbury (Respondent). (*Granted*).

0490-78-M: The Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Peel (Respondent). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

0404-78-M: 358602 Ontario Limited operating as Innovative Wood Products (Employer) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Trade Union). (*Dismissed*).

APPLICATIONS UNDER SECTION 112A

1495-77-M: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Muzzatti Masonry Contractor (Respondent). (*Granted*).

1543-77-M: United Brotherhood of Carpenters & Joiners of America, Local 2486, on behalf of following affected employees listed in Appendix "A" appended hereto (Applicant) v. Ellis-Don Limited (Respondent). (*Withdrawn*).

1787-77-M: Local 787, Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Consolidated Maintenance Services Limited (Respondent). (*Dismissed*).

1789-77-M: United Brotherhood of Carpenters and Joiners of America on behalf of the following affected employees listed in Appendix "A" appended hereto (Applicant) v. Ellis-Don Limited (Respondent). (*Withdrawn*).

1922-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders Association and Cadillac-Fairview Corporation Limited (Respondents). (*Dismissed*).

0445-78-M: Wood, Wire and Metal Lathers' International Union, Local 562 (Applicant) v. Speed Drywall Limited, Industrial Lathing & Plastering Co. and The Interior Systems Contractors' Association of Ontario (Respondents). (*Withdrawn*).

0569-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. Joe Corda Construction Ltd. (Respondent). (*Withdrawn*).

0578-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Mort's Crane Rentals Limited (Respondent). (*Withdrawn*).

0579-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Pine Vale Construction Ltd. (Respondent). (*Withdrawn*).

0580-78-M: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Kornelow-Leggieri Construction Ltd. (Respondent). (*Withdrawn*).

0598-78-M: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Casucci Construction Limited (Respondent). (*Withdrawn*).

0607-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders' Association and Randa Developments Limited (Respondents). (*Withdrawn*).

0648-78-M: Council of Trade Unions Teamsters Local Union No. 230 and Labourers International

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0688-78-M: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Moir Construction Co. Ltd. (Respondent). (*Withdrawn*).

0706-78-M: Christian Labour Association of Canada (Applicant) v. Sandercock Construction (1976) Limited (Respondent). (*Withdrawn*).

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0297-78-R: Local 1590, International Brotherhood of Electrical Workers (Applicant) v. Cable Tech Wire Company Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

0351-78-R: International Woodworkers of America (Applicant) v. Blind River Veneer Limited (Respondent). (*Dismissed*). (*Request Denied*).



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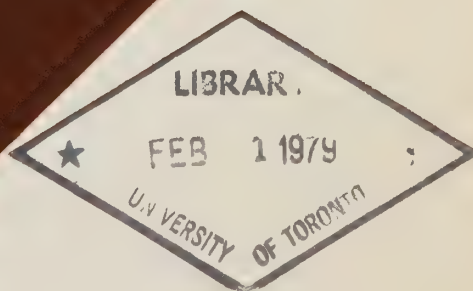
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1932-77-R Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Applicant, v. **Armoured Floor Company Limited**, Respondent, v. The General Contractors' Section of the Toronto Construction Association, Intervener #1, v. Labourers' International Union of North America, Local 183, Intervener #2.

Representation Vote – Charges – Board satisfied that vote reflects wishes of employees although officers of contending unions were improperly in vicinity of poll.

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members F. W. Murray and B. Lee.

APPEARANCES: *Stanley Simpson, G. Balanzin and A. Mariano for the applicant; Eric Baily for the respondent; no one appearing for intervener #1 and T. Kuttner and L. Castaldo for intervener #2.*

DECISION OF THE BOARD: September 22, 1978.

1. This matter arises out of a pre-hearing representation vote held Saturday, April 29, 1978, at the offices of the respondent. The poll was to be open from 9:30 a.m. to 10:30 a.m. The Board's records show that the voters' list was established by it from information supplied by the parties but was not signed by any of the parties for reasons not here relevant. There were 31 eligible voters on the list, of whom 25 cast ballots. No person, except Mr. Claudio Migotto as noted hereinafter, whose name was not on the voters' list presented himself to the Returning Officer claiming to be an employee entitled to a ballot. Seven of the ballots cast in favour of the applicant and seventeen in favour of the intervener #2 (hereinafter referred to as the intervener). One ballot was spoiled. The applicant, by an undated letter received by the Board May 8, 1978, requests that the Board order a new representation vote. The grounds for the request, stated generally, appear to be that: the vote was improperly conducted because of the alleged unrest and agitation of the voters arising out of a delay in opening the poll while the parties discussed the voters' list with the Returning Officer; and the persons attending to vote were improperly influenced by activities of officials of the intervener, which activities are alleged also to constitute a breach of the silent period prior to the vote.

2. The evidence discloses that Mr. Anthony Mariano, who had been appointed by the applicant to act as its scrutineer for the vote, and Mr. Lou Castaldo, who had been appointed by the intervener as its scrutineer, arrived at the polling station at approximately 9:00 a.m. Mr. Mariano is an international representative for the parent organization of the applicant and his responsibilities include serving Local 598. Mr. Castaldo is assistant manager for the intervener. The Returning Officer was already there when the two scrutineers arrived and very shortly afterward engaged them in a discussion about the voters' list. This discussion took place outside of the Returning Officer's car which was parked in a driveway to one side of the respondent's premises in view of and approximately 20 feet from some employees who were waiting for the voting to start. The discussion lasted about 15 minutes after which the three of them entered the polling area which was in the reception foyer at the front of the premises, met two representatives of the respondent, including its scrutineer, and discussed the make-up of the voters' list for a further 15 to 20 minutes, by which time it

was past the 9:30 a.m. time when voting was to have started. By this time there were approximately 15 to 20 employees waiting outside the entrance. The evidence of the applicant's two witnesses is not in accord as to the mood of the employees at this point in time. Mr. Mariano told the Board that, before the voting started, he went to the door and looked out and saw the men outside bunched around looking at the building. He did this because he could hear noise from outside even through the closed door. He told the Board that, while he could not hear what the employees outside were saying, he could see from the expressions on their faces that they were upset. One employee came forward from the group towards the front door with his arm raised asking "what's going on" and saying, "there's monkey business". At Mr. Mariano's request, the Returning Officer went out and asked the employees to be patient and the employees walked away from the door. Mr. Claudio Migotto, who was outside with the employees at this time, referred to them in his evidence as standing around in groups talking. The voting started shortly after 10:00 a.m. and proceeded in an orderly fashion with employees coming into the polling station one at a time, while the others remained outside of the premises.

3. The evidence revealed also that representatives of both the applicant and intervener, who were not scrutineers, were present prior to the commencement of voting. Mr. Mike Mihajlovic, a business agent for the intervener, arrived shortly after Mr. Mariano and Mr. Castaldo and was seen by Mr. Mariano (while he and Mr. Castaldo were outside talking to the Returning Officer) and Mr. Migotto talking to some employees. Neither heard anything that Mr. Mihajlovic was saying other than expressing a greeting to one employee. Mr. Mihajlovic is a former member of the applicant who was elected in 1976 as a business agent of that union and who, before taking office, became a representative of the intervener. He is well known to members of the applicant. A second business agent of the intervener, a Mr. Ceolin, was also present prior to and during the voting. He was seen by Messrs. Mariano and Migotto before voting began, leaning against his car, which was parked on the street on which the respondent's premises were located, in view of the employees waiting to vote. During the voting, unknown to Mr. Mariano, he was in an office at the rear of the premises, some 20 to 25 feet from the polling station and out of view of Mr. Mariano and the employees who were voting. He was not seen talking to any of the employees during the voting. Mr. Migotto, a former employee of the respondent in the bargaining unit involved in the vote, was present outside of the polling station talking with employees prior to the vote. He arrived there before 9:00 a.m. and before Messrs. Mariano and Mihajlovic. He claims that he came to vote, although he acknowledges that he had not worked for the respondent since being laid off in January 1978. Mr. Migotto had been acting business agent of the applicant during 12 months following his appointment May 27, 1976. He was one of several candidates who were campaigning at the time of the vote for election as a business agent of Local 598.

4. Mr. Mariano made Mr. Mihajlovic's presence known to the Returning Officer as soon as he was aware of it and the Returning Officer asked Mr. Mihajlovic to leave the area, which he did. He was seen again by Mr. Mariano at the entrance to the premises as soon as the voting finished. Mr. Ceolin's presence outside was made known by Mr. Mariano to the Returning Officer who called Mr. Ceolin inside and asked him to leave the area. Whereupon Mr. Castaldo sent him for coffee. It was after he returned with the coffee that he went into the office above referred. Mr. Migotto was asked by the Returning Officer, at Mr. Castaldo's request, to leave the area. He did so after the Returning Officer explained to him that his name was not on the voters' list. This was at the same time that Mr. Mihajlovic was leaving and Mr. Migotto saw him leave.

5. Section 92(5) of the Act allows the Board the discretion to "... hold such additional representation votes as it considers necessary to determine the true wishes of the employees." The Board's concern in the instant case is whether the Board can rely on the vote taken on April 29, 1978, as representing the true wishes of the employees. The Board has indicated the kind of climate which it considers suitable for the exercise of an individual employee's personal choice in casting his vote in *Wolverine Tube Division of Calumet and Hecla of Canada Ltd.* 63 CLLC paragraph 16.296 at 1228 wherein it refers to *Rogers Majestic Limited* D.L.5 7-1382 as follows:

"Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures and influences as the voting day approaches. The Board's view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he should vote."

The Board's concern about employees being subjected to partisan pressures and influences is evident in paragraph 2 of its decision in *J.R. Menard Ltd.* [1972] OLRB Rep. Oct. 915 and again in paragraph 2(g) of the "Registrar's Instructions Regarding Vote". Those instructions say that the scrutineer for a party to the vote should be a rank and file employee.

6. There is a presumption that representation votes conducted by the Board have been fair unless there is evidence to the contrary. The Board, having reviewed the events surrounding the taking of the vote in the case before it, finds as follows.

7. No evidence is before the Board that any eligible voter did not cast a ballot because of the delay in opening the poll. The delay in getting the vote underway may not have maintained the "atmosphere of calm" anticipated by the Board in *Wolverine Tube*, supra., but even giving the applicant the benefit of the strongest inference from its own conflicting evidence, the Board does not find that the situation has inhibited the employees in the expression of their choice on the ballot. Even if the Board might conclude (and it does not) that a situation which causes one employee to suspect "monkey business" is also a situation which conveys a suspicion of conspiracy between the parties and the Board's Returning Officer, the vote results would deny such a conclusion. Twenty-five of thirty-one eligible voters cast their ballots. The applicant's own evidence is that the vote, once underway, proceeded in an orderly fashion.

8. There is not a shred of direct evidence that the Board's "no propaganda rule" has been violated and the circumstantial evidence before the Board does not support a reasonable inference of violation of the rule.

9. There remains, therefore, only the presence prior to the vote of other persons identifiable with the interests of the applicant and the intervener who were not eligible voters and the determination as to whether their presence constitutes "partisan pressure or influence" such that the employees were inhibited in the free expression of their choice on the ballots cast. The Board notes that the intervener had two of its business agents present, one of whom (Mr. Mihajlovic) hardly two years earlier had been a member of the applicant with sufficient support within its membership to win an election as a business agent. The applicant, had present a member who, at the time of this vote, was an active candidate for

election as a business agent of Local 598 and who had been acting business agent for it during the 12 months starting May 27, 1976. The Board does not find it credible that a person with that experience would not be aware of its rules in respect of which employees are eligible to be on the voters' list in a pre-hearing representation vote. Therefore the Board does not accept his statement that his reason for being there was as a potentially eligible voter. The Board acknowledges that Messrs. Mihajlovic and Migotto left the voting area and Mr. Ceolin retired to a location where his presence was not visible to the voters when requested by the officer to vacate the area. The Board, therefore, holds that the conduct of the applicant only numerically differs from that of the intervener. The Board is satisfied that the presence of these three persons in this instance did not influence the vote.

10. Both trade unions, however, would have been better advised to avoid any suggestion of impropriety by instructing these persons to refrain from visiting the polling area. While this is a word of caution which might apply to any party to a representation vote, it has particular relevance to the applicant and intervener in this case. They and some of their brother locals are no strangers to the Board. In a significant number of applications for displacement of one or the other's bargaining rights in recent years there have been frequent allegations and counter-allegations of improper conduct in respect to organizational campaigns and representation votes. Without imputing the conduct of anyone of the parties to another of its brother locals, the Board is concerned with the potential that such circumstances have for the mere presence of an additional representative of one of the parties in the environs of a representation vote actually exerting partisan pressure or influence inhibiting of the free expression of choice by employees. Without either anticipating or appearing to prejudice future incidents similar to the instant case, the parties and their associated locals are cautioned that a future similar incident might be the cause of a favourable vote result being set aside.

11. The Board, having carefully considered all of the circumstances of this case, is satisfied that it should rely on the vote taken on April 29th as representing the true wishes of the employees and is not satisfied that there is any improper influence which would justify setting aside the vote and ordering another one. Therefore the Board declines in the particular circumstances of this case to exercise its discretion under section 92(5) to order another representation vote.

12. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

13. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots were cast in favour of the intervener.

14. The application is therefore dismissed.

15. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date thereof.

16. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the day of this decision, unless a statement

requesting that the ballot should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

0364-78-R to 0373-78-R Federation of Teachers in Hebrew Schools, (Applicant), v. Adath Israel Congregational School, **Associated Hebrew Schools of Toronto,** Beth Shalom Congregational School, Beth Tikvah Congregational School, Beth Tzedec Congregational School, Bialik Hebrew Day School, Community Hebrew Academy of Toronto, Eitz Chaim Schools, United Congregational Schools, and United Synagogue Day School, (Respondents).

Trade Union Status – Employee association purporting to transform itself into trade union – Whether organization is a trade union.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and W. F. Rutherford.

APPEARANCES: *G. Charney, Q.C., A. Gaertner and E. Bagola for the applicant; R. C. Fillion, H. Freedman and A. Applebaum for Adath Israel Congregational School, C. E. Humphrey and A. Tannenbaum for Associated Hebrew Schools of Toronto; Martin Sone for Beth Tikvah Congregational School; Bernard S. Dales for Beth Tzedec Congregational School; Harry Urman for Bialik Hebrew Day School; Gary M. Diamond for Community Hebrew Academy of Toronto; R. A. Werry and J. Goldwasser for Eitz Chaim Schools; S. Moscoe, Q.C. for United Congregational Schools.*

DECISION OF THE BOARD:

1. These are a number of applications for certification wherein the applicant is seeking to be certified to represent certain teachers engaged in the field of Jewish education. The hearings to date have dealt only with the issue of whether the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

2. For at least the past twenty-five years the teachers for whom the applicant seeks to obtain bargaining rights have dealt with the respondent schools, to a greater or lesser extent, through an association known as The Jewish Teachers Alliance ("the Alliance"). The Alliance has in the past negotiated certain "agreements" with the various schools and also assisted teachers with grievances concerning the schools. It was not contended by any of the parties that the Alliance was a trade union within the meaning of the Act or that the agreements it entered into with the schools were collective agreements.

3. By 1968 most, if not all, of the respondent schools had entered into an agreement with the Alliance whereby the school agreed to deduct from each teacher's monthly salary dues for the Alliance and to forward those dues to the Alliance's financial secretary. Mr. Jacob Prasow who in recent years served as the Alliance's financial secretary, stated that at

one time all of the respondent schools deducted dues amounting to one-half of one per cent of each teacher's salary and forwarded them to the Alliance, the only exceptions being with respect to a small number of teachers who objected to the paying of dues to the Alliance.

4. No one who testified could recall any teachers having formally applied to become members of the Alliance. Rather, it seems to have been assumed that once a teacher was retained by one of the respondent schools and had dues deducted on his or her behalf, then that teacher automatically became an Alliance member.

5. Although most, if not all, of the respondent schools entered into an agreement with the Alliance in 1968, in recent years a number of the schools adopted the position that they were under no legal obligation to negotiate with the Alliance and declined to do so. Notwithstanding this development, all of the respondent schools, with the exception of the Adath Israel Congregational School, continued to make dues deductions from teachers' salaries and to forward them to the Alliance. Mr. Bagola, the most recent President of the Alliance, indicated that it was the refusal of a number of the schools to negotiate with the Alliance which was behind the decision to seek formal bargaining rights.

6. During 1977 a draft constitution was circulated among the teachers employed by the respondent schools. The constitution was for an organization to be known as the Federation of Teachers in Hebrew Schools.

7. In November of 1977 large numbers of the teachers employed by the respondent schools applied for membership in the Federation of Teachers in Hebrew Schools, albeit that no such organization was then in existence. These applications for membership were filed with the Board in support of these applications for certification. In connection with each of the membership applications there was also filed a receipt indicating that the applicant had received a dollar payment in connection with the membership application. Each of the receipts bears the same date as the corresponding membership application and is signed by both the person purporting to act as the collector of the dollar and the employee concerned. The Form 8 – Declaration Concerning Membership Documents, submitted with respect to all of these files, except that relating to the Adath Israel Congregational School, state that "The monies shown on the official receipts reflect monies checked off by the respondent from each individual member and submitted to the applicant". In November of 1977 any monies being checked-off by the respondents from teachers' salaries would appear not to have been deducted for use by the applicant – which was not then in existence – but rather were being deducted and forwarded to the Jewish Teachers Alliance. The Form 8 filed with respect to the Adath Israel Congregational School states that "The monies referred to in the official receipts were collected by the voluntary submission of the employees on a periodic basis, equal to one-half of one per cent of their salaries." All of the receipts, with one exception, filed as part of the membership evidence with respect to the Adath Israel Congregational School are dated November 28, 1977, the exception being a receipt dated May 15, 1978.

7. Having regard to the fact that most of the receipts being relied on by the applicant as part of its membership evidence relate to money apparently paid not to the applicant but rather to the Alliance, there exists considerable doubt in our minds as to whether the great majority of the employees for whom membership evidence was submitted by the applicant actually meet the definition of "member" set out in section 1(1)(j) of the Act. Coun-

sel for the applicant, however, indicated he would have the Board deal with the matter of the applicant's status as a trade union and leave aside the question of whether the membership evidence as filed would be sufficient for the purposes of the applicant being certified. This we propose to do.

8. On December 14, 1977 a meeting was held with some 48 persons in attendance, apparently all of them being teachers in the employ of the respondents. Indications are that most, if not all, of those in attendance had earlier signed membership applications in the name of the applicant, although the great majority or those who had earlier signed membership applications did not attend the meeting. At the meeting a constitution in the name of the Federation of Teachers in Hebrew Schools was read and adopted and officers were then elected to fill the executive positions provided for in the constitution. No one signed applications for membership at the meeting and none of the persons who had earlier applied for membership in the name of the applicant re-affirmed their earlier applications. The constitution as adopted was not subsequently ratified. In May of 1978 thirteen additional teachers signed applications for membership in the name of the applicant.

9. Section 1(1)(n) of The Labour Relations Act defines a trade union, in part, as "an organization of employees formed for purposes that include the regulation of relations between employees and employers ..." Such an organization is entitled, if it otherwise qualifies, to be certified, to negotiate collective agreements and generally to exercise the rights of a trade union under the Act. The Board, in seeking to determine whether an applicant before it is a trade union, requires that it be more than just an informal joining together of individuals. Instead, the Board requires that the applicant be a formal organization whose members have bound themselves together on the basis of specific terms for purposes that include the regulation of relations between employees and employers. The decision of the Supreme Court of Canada in *Orchard v. Tunny* (1957) 8 D.L.R. (2d) 273 and of the Ontario Court of Appeal in *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 indicate that the essence of a trade union is a group of individuals who have entered into a contractual relationship one with the other, the terms and conditions of which are provided by the union's constitution. In *Orchard v. Tunny* Rand J. in delivering the majority decision of the Court stated at p. 281:

"Apart, then, from statute, that a union is held together by contractual bonds seems obvious, each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that their rules shall bind them in their relations to each other. That means that each is bound to all the others jointly"

In *Astgen v. Smith* Mr. Justice Evans in giving the majority decision of the Court made the following statements concerning the International Union of Mine, Mill and Smelter Workers at p. 662:

"Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelt out in

the memorandum of association usually referred to as the 'constitution', the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill.

I adopt also the proposition stated by Thomson J. in *Bimson v. Johnson et al* [1957] O. R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1958] O.W.N. 217, 12 D.L.R. (2d) 379: '... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws ... The contract is not a contract with the union or association as such, which is devoid of power to contract, but rather the contractual rights of a member are with all other members thereof' ''.

10. Once a trade union has come into existence it is a relatively simple matter for others to become members of the organization and thereby enter into a contractual relationship with the existing members. When a new member joins, however, he does so on the basis of a pre-existing constitution. He knows (or at least should know) that it is a trade union which he is joining, that he is entering into a contractual relationship with the other members of the union and that the terms of that relationship are as spelt out in the union's constitution. The more difficult procedure to accomplish is for a group of employees to create a trade union where none has existed before. This process must involve not only the settlement of the terms of a constitution for the union, but also the taking of steps which make it clear that the individuals involved have actually entered into a contractual relationship one with another on the basis of the terms set forth in the constitution.

11. The Board has in a number of cases indicated a series of steps which will generally be sufficient to insure that a trade union has been brought into existence. See, for example, *Local 199 U.A.W. Building Corporation* [1977] OLRB Rep. July 472.

These steps may be summarized as follows:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.
3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.

4. The constitution should be ratified by a vote of the members.

5. Officers should be elected pursuant to the constitution.

12. As indicated above, the great majority of the membership applications filed in these proceedings are dated prior to the adoption of the constitution. Thus it cannot reasonably be said that the employees at the time that they signed these applications were agreeing to become contractually bound one to another in that the terms of such a contractual relationship simply did not exist. Further, the fact that at the same time that these applications for membership were signed the employees also signed receipts in the name of the applicant, albeit for money payments apparently destined for the Alliance, suggests that some of the employees may well have been of the view that no differences existed between the Alliance and the applicant. A constitution was adopted at the meeting on December 14, 1977. However, at that meeting no one joined the applicant or re-adopted membership applications executed earlier. In short, while the people present at the meeting seem to have decided upon the terms of a constitution for the applicant, there is no evidence that they individually adopted the terms of the constitution as the basis of a contractual relationship one with another. In these circumstances there could not have been a ratification of the constitution by actual members of the applicant.

13. We do not believe that the Board should be unduly technical in determining whether a trade union has come into existence, and in this regard would refer to the *Local 199 U.A.W. Building Corporation* case referred to above. In the instant case, however, because of the time lapse involved between the signing of the membership applications and the adopting of the constitution as well as the circumstances surrounding the receipts issued at the time that employees did sign the membership applications, we simply are unable to conclude that on December 14, 1977 employees entered into a contractual relationship one with another so as to create an "organization of employees". It follows from this that the thirteen applications for membership dated in May of 1978 would have been with respect to a non-existent organization. We are, therefore, not satisfied that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

14. Before leaving this matter, we would make one comment concerning the terms of the constitution which was adopted on December 14, 1977. The constitution purports to limit eligibility for membership in the applicant very narrowly. Without making any suppositions as to what the appropriate bargaining unit might be in applications involving teachers in the respondents' schools, we would note that in the past the Board has declined to certify a trade union which excluded from becoming members some of the employees included in the bargaining unit. The rationale underlying this position is set out in *Gaymer & Oultram* 54 CLLC ¶ 17,073.

15. The applicant not having established that it is a trade union within the meaning of the Act, these applications are hereby dismissed.

0606-78-R Canteen of Canada Employee Association, Applicant, v. **Canteen of Canada Limited**, Respondent, v. Retail Clerks Union, Local 206, Intervener.

Certification – Trade Union Status – Collective Agreement – Agreement to enter new agreements if new operations established held to be voluntary recognition agreement – Failure of employees to properly constitute trade union.

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *James Fyshe, Marcel Milks and Randy Dalton for the applicant; James Hassell, A. D. G. Purdy and L. W. Willmott for the respondent and Alick Ryder, Barry Baily and Clifford Evans for the intervener.*

DECISION OF THE BOARD: September 28, 1978.

1. The name "Canteen of Canada" appearing in the style of cause of this application as the name of the respondent is amended to read: "Canteen of Canada Limited".
2. This is an application for certification.
3. This is a first application for certification by the union. Therefore the applicant was required to establish its status with the Board as a trade union within the meaning of section 1(1)(n) of The Labour Relations Act and it was properly notified to this effect prior to the hearing.
4. There was also to be decided the preliminary issue of the intervener's right to intervene in this application. It based its intervention on the claim that it is the bargaining agent of the employees affected by the application by virtue of a current collective agreement between it and the respondent. The applicant disputed the existence of a collective agreement and, as a result, the Board required the intervener to establish that it either had a valid, current collective agreement, which might be a bar to the application or that it held bargaining rights in respect to at least one employee in the bargaining unit claimed by the applicant. The evidence before the Board in respect of the intervener's status reveals the following facts.
5. Retail Clerks Union, Local 206 is the only local of the Retail Clerks International Union with which the respondent has collective agreements in the Province of Ontario. There is a current collective agreement between the intervener and the respondent, covering the respondent's vending operations, which was signed May 1, 1978 and is to be in effect during the period January 1, 1978 to December 31st, 1979. This agreement is the successor to another two year agreement between the parties which expired December 31, 1977. Article 1-Recognition of the agreement provides as follows:

- 1.01 This Agreement shall apply to all employees of the Company working at, in or out of the Ontario Counties of Waterloo, Perth, Simcoe, Lambton, Oxford, Huron, Grey, Bruce, Dufferin and Wellington, and the Regional Municipality of Ottawa-Carlton,

save and except Supervisors, office Staff, and those above the rank of Supervisor or who have authority to exercise discipline over employees on behalf of the Company.

- 1.02 Should the Company establish new operations (Branches) in any of the areas outlined in Section 1.01, new separate agreements will be written to cover such new operations. The Company and the Union will establish proper classifications and rates of pay and failing to come to an agreement with these changes the matter will be submitted to an arbitrator for final decision.

The reference in clause 1.01 to the Regional Municipality of Ottawa-Carlton does not appear in the predecessor agreement and was added as one of the results of the negotiations leading to the current collective agreement.

6. The form of the current collective agreement was described by the intervener to the Board as a master agreement between it and the respondent. Under this master agreement, there are separate agreements for the respondent's branches in the areas defined in clause 1.01 covering local classifications and wages. No local agreement on classifications and wages had been settled between the intervener and the respondent as of the date of this application for the employees affected by it. The intervener filed with the Board a draft document which he identified as being a draft of a local agreement covering the respondent's operations in the Regional Municipality of Ottawa-Carlton on which he was attempting to get the respondent's agreement. The document submitted was one which contained all of the articles of the master agreement and appears to differ only in respect of some of the clauses and some of the contents of the appendices to the collective agreement.

7. It was the intervener's evidence that, until a local agreement was settled for new operations under clause 1.02, it was the practice of the parties that all terms and conditions of the master agreement, including classifications and wages, would apply. It was the applicant's evidence, and the Board accepts it, that none of the terms and conditions, particularly wages and classifications, of the master agreement were in effect for the respondent's Ottawa operations.

8. The Board heard the parties' submissions on the evidence and then adjourned to consider them. Having done so, the Board issued its decision orally. The decision was that the current master agreement between the intervener and respondent, insofar only as it applies to the unit of employees which the applicant seeks to represent, is a voluntary recognition agreement but not a collective agreement. Therefore the application is timely and the intervener is a party to the hearing in respect to all matters before the Board.

9. The Board proceeded to hear evidence and argument thereon on all remaining matters in respect of this application, including whether trade union status would be granted to the applicant.

10. The evidence led in respect of the Board's inquiry into the applicant's efforts to form a trade union establishes the following facts.

- (a) The idea to attempt to form a trade union emerged from conversa-

tions between Messrs. Randy Dalton, who represented himself as president of the applicant and Marcel Milks, who represented himself as vice-president of the applicant. This discussion resulted in Mr. Dalton deciding to attempt to convert an informal employee social club into the applicant organization.

- (b) Individual notices were sent to employees advising them that a meeting would be held on June 15, 1978, in the evening, in the respondent's cafeteria. The meeting was attended by seventeen employees. The Board is satisfied, on the evidence before it, that the respondent was not aware of the purpose of the meeting when it granted permission to the employees to use the cafeteria for a meeting. Mr. Dalton took charge of the meeting.
- (c) The minutes of that meeting show that the employees elected a slate of officers consisting of president, Randy Dalton; vice-president, Marcel Milks; secretary, Glen Burk; treasurer, Dianne Richards; and director-at-large – Sally Bryant. The only other order of business, except for adjournment, was to admit employees into membership and collect an initiation fee of \$5.00 from them. The minutes do not indicate how many of the employees attending joined the association.
- (d) The minutes contain no reference to a constitution for the association and other evidence in this respect is contradictory. Nonetheless it was possible for the Board to establish the following facts as to whether a constitution existed. Mr. Dalton prepared a handwritten document which is alleged to be a draft constitution. This document was in existence at the June 15th meeting. Some employees had signed it prior to the day of the meeting and some signatures were obtained prior to Mr. Dalton taking charge of the meeting on June 15th. The document itself is not in evidence before the Board. Mr. Dalton transcribed it into a typewritten document with a few changes from the original. That part of the page of the original bearing the signatures of the employees was detached from the original and attached to the typewritten document. This latter document is undated. Approximately one week after the June 15th meeting the typewritten document was further transcribed into what is referred to as the final draft of the constitution and was signed by employees, again at different locations and different times. The signatures which are alleged to have been on the handwritten document are 17 in number, 15 of the employees whose signatures are shown attended the meeting on June 15th. The document which is alleged to be the final constitution bears a total of 16 signatures, 13 of which are the signatures of the same employees who signed the handwritten document and attended the June 15th meeting.
- (e) There was no vote on a draft constitution at the meeting.

11. The evidence on the question of whether the association adopted a constitution is contradictory in two significant respects: firstly, as to it being discussed at the June 15th meeting; and, secondly as to it being ratified at or following the June 15th meeting. The applicant's evidence is that the handwritten document was discussed with the members at the meeting and that the first typewritten document was present as well at the meeting and seen by the employees. The intervener's evidence is that, while the handwritten document was present at the meeting, the only discussion in respect of it was prior to the meeting when it was a situation in which many employees were speaking at once and the employee with the loudest voice was holding sway. The intervener further alleges that the first typewritten document was not present at the meeting.

12. The Board, on the evidence before it, finds that no constitution was placed before, or voted upon by the employees who attended the June 15th meeting. There was no constitution until at least one week after the meeting when the final typewritten document was prepared and signed by a majority of the employees who had attended the meeting. Having adopted a constitution, no steps were taken by the applicant to confirm that the election of officers and the admission of members was in accordance with the constitution. To put it another way, nothing was done to connect the last event to the first two, thus leaving incomplete the chain of events while the Board might ordinarily accept as evidence that a trade union has been brought into existence. It follows then, while the employees joined something and elected officers to it, it was something other than a trade union and the Board finds, therefore, that the applicant is not a trade union within the meaning of section 1(1)(n) of the Act.

13. Before the Board will grant trade union status to an organization it must be satisfied that the applicant organization is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act which defines a trade union as an organization of employees formed for purposes that include the regulation of relations between employees and employers. An applicant wishing to establish its status as a trade union within that meaning, must satisfy the Board that:

- (a) it is an organization of employees;
- (b) it was formed for purposes that include labour relations; and
- (c) it is a viable entity for collective bargaining purposes.

14. Each case of an organization seeking trade union status must be decided upon its own facts. The Board, however, had generally been satisfied that a trade union had been brought into existence when the following conditions are met.

- (a) There is a written document (eg., a constitution or charter) which at least defines how membership is obtained; provides for officers or persons to be elected with authority to act on behalf of the organization; provides for the calling of membership meetings; and includes a statement of purpose which includes the regulating of relations between employees and employers.
- (b) The document is approved by the employees.

- (c) Employees are admitted to membership in accordance with the terms of the document or are confirmed afterwards as members if they join the organization before the document is adopted.
- (d) The document is ratified by the said members.
- (e) Officers or persons to act for the organization are elected in accordance with the constitution.

For an example, see *Local 199 U.A.W. Building Corporation* [1977] OLRB Rep. July 472.

15. The Board attempts not to be unduly technical in determining whether those conditions have been met sufficiently that a trade union has come into existence. This may be particularly so where, as in this case, the employees were acting without benefit of any knowledgeable advice when they were attempting to form a trade union. The Board, at the same time, must balance the latitude to be allowed in determining matters of trade union status with the important rights, privileges and duties which a trade union obtains when it is granted status. In this case, the applicant has not satisfied the Board, even giving the applicant's evidence the most favourable possible weight, that it has succeeded in forming an organization which would be a viable entity for collective bargaining purposes. Without prejudice, the applicant may have been successful had it done, at the very least, the following in its June 15th meeting.

- (a) adopted its constitution;
- (b) accepted employees into membership; and
- (c) elected officers to run the organization.

In this regard, see *Local 199 U.A.W. Building Corporation*, supra, particularly paragraphs 11, 12 and 13 thereof.

16. For the above reasons, therefore, the Board is not prepared to grant trade union status to the applicant. Consequently it is not necessary for the Board to decide any other issues arising out of this application.

17. The application is dismissed.

0664-78-M; 0666-78-M 380611 Ontario Limited, known as **Colonial Tavern**, (Employer), v. International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C., (Trade Union).

Reference – Successor status – Atmosphere of tavern changed by expansion of food facilities and addition of topless waitresses and other entertainment – Change in business not sufficient to relieve employer of collective bargaining obligations

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *D. L. Brisbin and M. Lyons for the employer; Beth Symes, Julius Trolls and Joyce Manson for the trade union.*

DECISION OF THE BOARD: September 15, 1978.

1. The Board directs that the above applications be and the same are hereby consolidated.

2. The Minister has referred to the Board, pursuant to section 96 of The Labour Relations Act, two questions: whether the Minister has authority under the Act to appoint a conciliation officer; whether the Minister has authority under the Act to appoint a person to constitute a board of arbitration. The answer to both of these questions depends upon whether the employer has changed the character of the business known as the Colonial Tavern so that it is substantially different from the business of the predecessor employer. At the hearing, counsel for the employer conceded that the transaction which occurred on May 23, 1978, constituted a sale of a business within the meaning of section 55 of the Act and that a proper notice to bargain had been delivered.

3. Under section 55(5) of the Act, the Board has a discretion to terminate the bargaining rights of a trade union, a sale of a business notwithstanding. The condition necessary to the exercise of this discretion by the Board is a finding that the person to whom the business was sold has changed the character of the business so that it is substantially different from the business of its predecessor. In deciding whether a change in character within the meaning of section 55(5) has occurred, the Board has regard to the purpose of section 55 as a whole, which is to provide permanence to establish bargaining rights. In *Winco-Steak'n Burger*, [1974] OLRB Rep. Nov. 788, the Board had this to say about the kind of situation for which section 55(5) was designed.

The implementation of subsection 5 of section 55 involves the revocation of the remedial effects otherwise flowing from the provisions of section 55 of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words "substantially different" must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review.

4. At the hearing, counsel for the employer based its request for section 55 relief on

the ground that the Colonial has changed from what was before essentially a bar to what is now essentially a restaurant. There was evidence of a change in the type of entertainment provided. However, this change – the utilization of persons to perform both service and entertainment (i.e. burlesque) functions was of a lesser magnitude than the change which occurred in *251628 Holdings Limited trading as Jimmy's II*, [1977] OLRB Rep. Sept. 572 and was not relied upon by counsel. It should be emphasized that the trade union stated, as it did in *Jimmy's*, that it is not seeking to represent any of the “dual function” employees in their capacity as entertainers or to interfere in the decision as to how much of their time is to be spent in the performance of entertainment as opposed to serving functions.

5. Before outlining the evidence with respect to the alleged change in character, the precise scope of the union's bargaining rights should be emphasized. Changes occurring in areas not covered by existing bargaining rights cannot, of course, be accorded significance for purposes of section 55(5). The Colonial is divided, as it was before the sale, into four physically distinct areas – the basement, the main floor, the mezzanine and the patio. The collective agreement between The Hotel Association of Metropolitan Toronto and the union (dated June 30, 1977), the last collective agreement between the trade union and the predecessor employer, had application only to bartenders and waiters/waitresses working in the basement, the main floor, and part of the patio (the approximately 40 tables in the “cocktail section”). The Agreement was not applied to waiters/waitresses working in the mezzanine and the remaining portion of the patio.

6. Before the sale of the Colonial to the employer, the basement lounge sold liquor as well as draft and bottled beer – all at “bargain basement” prices. Food was served but only according to Mr. Lyons, the former manager of the Colonial, upon request “to accommodate the customer”. The Board was informed that the prices in the basement lounge, which has been refurbished, have tripled since the sale and that the employer's intention is to create a businessman's room catering to the “double martini types”. To that end, the basement lounge now offers a fairly extensive food menu which is served, as is the liquor and beer, by topless waitresses who perform, in addition to their serving duties certain entertainment functions (i.e. dancing nude on a stage). Before the sale, waiters in the basement lounge were fully clothed and did not entertain

7. Before the sale, the main floor lounge at the Colonial sold mostly liquor. It did, however, offer a basic selection of draft and bottled beer, as well as a limited selection of wines. At the time of the sale, the main floor lounge was operated as a food commissary serving a fairly large number of items (sandwiches, hamburgers, hot dogs, corned beef, chicken and shrimps in a basket, fish and chips, salads, etc.). The main floor has now been converted into what Mr. Lyons described as a New York bar and grill. This, in the hopes of attracting the “upper echelon” Yonge Street luncheon traffic. Although the menu now includes a few items not previously offered (such as oysters and spareribs) as well as an expanded selection of wine and beer together with a number of non-alcoholic drinks, the main change, apart from the introduction of burlesque, relates to the quality of the food and its cost, both of which are higher. The Board was informed that the employer is planning to hire topless waitresses to serve and entertain during the day and that its plans for the evening include the presentation of major contemporary variety artists of the type now appearing at the Royal York Hotel. Apparently, waitresses in the evening will be fully clothed.

8. It was not suggested that the cocktail section of the patio area, which is open from May to October, operates in any significant respect differently than before the sale.

9. Apart from the existence of persons performing both service and entertainment functions, the evidence does not disclose any differences which could be said to materially affect the nature of the work requirements and skills involved in the portion of the business for which the trade unions holds bargaining rights. In this regard, the changes in price structure and clientele are not significant. The evidence indicates that the employer intends to place a greater emphasis upon the service of food. But it was not suggested that the skills required of the employees who would be serving that food, most of which was offered by the predecessor employer, were of a different type than those required previously. Nor was it suggested that the service of liquor would be de-emphasized in the new operation. It should be noted that the liquor licences for the Colonial – two lounge licences and a dining room licence – were transferred to the employer without modification.

10. The Board, having regard to these considerations, must conclude that continued representation by the trade union would not be inadequate, inappropriate or unreasonable in all the circumstances of this case. Accordingly, the employer's request for a declaration terminating the bargaining rights of the trade union is denied.

11. The Board finds that the trade union continues to be the bargaining agent for the employees of the employer in the bargaining unit described in the collective agreement between The Hotel Association of Metropolitan Toronto and the trade union, and that the minister has authority under the Act to appoint a conciliation officer and a person to constitute a board of arbitration.

0413-78-R United Steelworkers of America, (Applicant), v. Crown Cork and Seal Company Limited, (Respondents).

Related Employer – Canadian subsidiary of American parent company – Union seeking declaration in order to plug Canadian employees into master agreement covering U.S. employees – Canadian local separately certified and bound by separate agreement – Board declining to make declaration.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and E. C. Went.

APPEARANCES: *Wm. S. Mills and S. T. Goudge for the applicant; M. G. Mitchnick, A. Manze and J. Alexander for Crown Cork and Seal Company Limited; no one appearing on behalf of Crown Cork and Seal Company Inc.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER E. C. WENT: September 27, 1978.

1. This is an application under section 1(4) of The Labour Relations Act in which the applicant is seeking a declaration that the two respondents constitute one employer for the purposes of the Act.

2. Section 1(4) of The Act provides as follows:

1. – (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. Crown Cork and Seal Company Limited (“the Canadian company”) is a company incorporated under the laws of the province of Ontario which operates a can-making plant and employs certain office and clerical staff at its facilities in Concord, north of Metropolitan Toronto. The company also operates certain facilities in both Montreal and Vancouver. All of the shares of the Canadian company are owned by Crown Cork and Seal Company Inc. (“the parent firm”) which has its headquarters in Philadelphia, in the United States of America. The parent firm carries on operations at various locations throughout the United States.

4. The day to day direction of the Canadian company is in the hands of its management in Canada, although matters of particular importance as well as issues of general policy are discussed with officers of the parent firm. In general, industrial relations policies for the Canadian company are set in Canada, although there is some degree of consultation with officers of the parent firm. Further, both the Canadian company and the parent firm use the same job evaluation system and the Canadian company has sought assistance from the parent firm concerning its use. In its initial filings the applicant contended that there had been frequent transfers of employees of the Canadian company to plants in the United States. The evidence, however, establishes only that on a number of occasions individual production employees from Concord have been asked to spend brief periods of time in an American plant for the purpose of either helping to correct some production problem in the American plant or to demonstrate to U.S. workers a production technique employed at Concord. Similarly a few American employees have spent brief periods of time in Concord. There is clearly no regular or large-scale transfer of employees between Concord and any of the parent firm’s plants in the United States.

5. Although acknowledging that all of the shares of the Canadian company are owned by the parent firm, counsel for the Canadian company contended that because of the independence of operation of the Canadian company, the two respondents could not be said to be under common direction or control. For the purpose of these proceedings, however, the Board is prepared to assume (but without so finding) that the two respondents are in fact carrying on associated or related activities or businesses under common direction or control.

6. The fact that associated or related activities or businesses are being carried on under common direction or control will not in every case cause the Board to make a declaration under section 1(4). The section itself is worded in such a way so as to give the Board a discretion as to whether or not to make such a declaration even when all of the statutory requirements for such a declaration have otherwise been met. Thus, for example, the Board has declined to make a declaration under section 1(4) where the effect would be to allow

one trade union to bar another trade union from acquiring bargaining rights for a company for which the first trade union had not itself already acquired bargaining rights. (*Zaph Construction Ltd.* [1977] OLRB Rep. Nov. 741) as well as in instances where a trade union was seeking to use a declaration under section 1(4) as a substitute for obtaining bargaining rights by way of normal certification procedures. (*Inducon Construction of Canada Limited* [1975] OLRB Rep. April 399). An indication of some of the situations where a declaration under section 1(4) would be appropriate is contained in the following excerpt from *Industrial-Mine Installations Limited* [1972] OLRB Rep. Dec. 1029:

Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al.* [1971] OLRB Rep. 406.

It is in these type of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.

7. In the instant case counsel for the applicant requested that the Board make a declaration that the two respondents constitute a single employer for the purposes of the Act, but made it clear that he was seeking no additional remedial order. Counsel for the Canadian company opposed the making of such a declaration on the grounds that it was an attempt to bind the Canadian company to the terms of a "master" collective agreement between the applicant trade union and the parent firm which covers employees at a number of locations in the United States.

8. The current master collective agreement between the applicant and the parent firm is not before the Board. However, there was filed by the applicant a copy of the previous master collective agreement which according to counsel utilizes the same language as does the current agreement. Section 2 of Article 1 of this collective agreement states in part as follows:

The bargaining unit includes employees occupying jobs in the bargaining units set forth in Appendix A of this agreement and the employees of any plant of the Company at which metal cans, crowns or closures are manufactured for whom the Union may during the life of this Agreement be certified or recognized; and all such employees are referred to whenever the term 'employee' is used in this Agreement.

9. In August of 1977 the applicant was certified to represent certain production employees of the Canadian company at Concord. These employees had previously been represented by the Crown Cork and Seal Employees' Association. In October of 1977 the applicant was certified to represent certain office and clerical employees at Concord who had previously been unorganized. Negotiations for a collective agreement for the Concord production employees commenced in October of 1977, while those for the office and clerical employees began in December of the same year. In October of 1977 negotiations for a new master agreement between the applicant and the parent firm were also held in Miami. At both the Miami and the local negotiations the applicant took the position that the employees of the Canadian company at Concord should be covered by the master agreement. Upon meeting resistance from both of the respondents to this contention, however, the applicant did not continue to press its position and a new master agreement between the applicant and the parent firm was signed sometime in October of 1977 which apparently did not make any reference to the Concord employees. The applicant and the Canadian company entered into a collective agreement with respect to the production employees at Concord during June of 1978 and into another one covering the office and clerical employees in July of 1978. It is clear from the testimony, of Mr. William Mills, a representative of the applicant, that it is the desire of the applicant to have one or both of the bargaining units at Concord covered by the master agreement after the current Concord agreements expire.

10. Counsel for the applicant was somewhat vague in explaining the use the applicant would make of any Board declaration that the two respondents constitute one employer for the purposes of the Act. Counsel for the Canadian company expressed the concern that once the current Concord collective agreements expired the applicant would use any Board declaration as the basis for contending that the employees of the Canadian company in Concord were now covered by the master agreement between the applicant and the parent firm.

11. We are of the view that it is incumbent upon an applicant seeking relief under section 1(4) of the Act to advance some valid industrial relations purpose which would be served by the Board exercising its discretion and granting the relief requested. In the instant case the applicant failed to advance any such reason. If in fact the purpose behind the application is to bring the Concord employees under the collective agreement between the applicant and the parent firm, then we do not regard that as a proper basis for the Board to make the declaration requested of it.

12. The master agreement is specifically stated to be between Crown Cork and Seal Company Inc. (the parent firm) and the applicant. We were referred to nothing in the agreement which would indicate that it was meant to apply to a subsidiary of the firm which was operating outside of the United States. The applicant acquired its bargaining rights for the Canadian company's Concord employees by way of two separate certificates from this Board and those bargaining rights are currently reflected in two separate collective agreements. During the most recent negotiations both in the United States and Canada the applicant sought at the bargaining table to have the respondents voluntarily agree to alter this bargaining structure, but without success. We are of the view that section 1(4) of the Act should not be used in circumstances such as this to impose a new bargaining structure on an unwilling employer, particularly where it has not been shown that the existing bargaining structure is inappropriate or lacks viability. It should be noted further that it was not even alleged that the Canadian company was failing to fulfill its obligations under the existing bargaining structure, seeking to subvert existing bargaining rights, or somehow attempting to avoid the effects of any collective agreement which it had entered into. It is clear that the applicant is of the view that the employees of the Canadian company which it represents at Concord should be employed under the same terms and conditions as are the employees of the parent firm in the United States. Without seeking to detract from the motives which might underlie such a position, that is a matter for collective bargaining. For this Board to allow section 1(4) of the Act to be used as a means of importing the terms of U. S. negotiated collective agreements into Ontario would in effect mean that this Board would be imposing the terms of collective agreements upon Ontario based bargaining units rather than having them negotiated through free collective bargaining. In our view this runs counter to the general intent of the Act and is not a proper use for section 1(4). Accordingly we decline to treat the two respondents as constituting one employer for the purposes of the Act or to declare them to be one employer.

13. Having regard to the above, there is no need to deal with the question raised at the hearing concerning the Board's jurisdiction to issue a declaration under section 1(4) with respect to a corporation which does not carry on business in Ontario.

14. This application is hereby dismissed.

DECISION OF BOARD MEMBER D. B. ARCHER:

L. It is obvious that the International Agreement between the Steelworkers and the major can companies influences the company in their negotiations with the union. However, the Board is restricted to issuing a certificate covering any or all employees in Ontario. It seems to me that no matter how desirable it may be to have the Concord employees covered by the Master Agreement, the Board cannot apply the master agreement, this is a matter for collective bargaining. The union admits it can quote no legal authority in this area. I

therefore join my colleagues in their final decision without adopting all of the reasons for decision.

0715-78-R Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers, (Applicant), v. **Diversey (Canada) Limited and Diversey Environmental Products Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Bargaining Unit – Related Employer – No 1(4) declaration made where separate business entities, remote corporate relationship, no function interaction or interchange of employees and producing different chemical products for different markets.

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *J. McNamee for the applicant; C. M. McKeown, Geo. Newberry and J. Vanderlaan for the respondents; Robert J. White for the objectors.*

DECISION OF THE BOARD: September 15, 1978

1. In this application for certification the applicant has requested a bargaining unit composed of employees of Diversey (Canada) Limited and Diversey Environmental Products Limited, the two corporate respondents. In their replies to the application, the respondents both take the position that they are separate and distinct corporations, that the employees of the two companies do not share a community of interest, and that the labour relations of the parties would be best served by the determination of the appropriate bargaining unit for each company. At the hearing, the applicant requested that the Board exercise its discretion pursuant to section 1(4) of The Labour Relations Act and treat the two corporations as constituting one employer. This request was opposed by the respondents.

2. Diversey Environmental Products Limited (hereinafter DEPL) occupies premises adjacent to the premises of Diversey (Canada) Limited (hereinafter Diversey) on land rented from Diversey. The premises, however, are physically separate and self-contained. DEPL is located in a fenced-off area with its own entrance, parking lot, street address and sign. There are no common areas and no connecting tunnels or catwalks. Each company has its own maintenance department and facilities, delivery trucks, telephone number, and stationery (letterhead).

3. Diversey is primarily engaged in the production of cleaning compounds for use in private industry – hotels, hospitals, etc. It produces approximately 450 products and employs a sales force of 140. DEPL, which employs only one salesman, makes a single product – soluble iron – which is sold as an iron solution for use in municipal sewage treatment facilities. Because the product is produced by chemical reaction and with relatively sophisticated equipment and materials, DEPL's production force is comprised of employees possessing greater educational qualifications and experience than those possessed by the Di-

versey employees who are for the most part unskilled. Employees of DEPL must have grade 12 chemistry and are rigorously screened before hiring by means of a mechanical comprehension test. By contrast with the production process at Diversey, which is basically a blending operation wherein employees follow a batch sheet and add ingredients to a mixer, the DEPL process of production requires continuous monitoring and maintenance of reaction conditions and the exercise of judgmental skills.

4. Dow Chemicals owns forty per cent of the shares of DEPL. Diversey, which is a wholly-owned subsidiary of Diversey Corporation which in turn is a wholly-owned subsidiary of Molson's, owns the remaining sixty per cent. There is a common thread of control at the corporate level. John Peck is the president of both companies. George Norrie, the secretary-treasurer and vice-president of finance for Diversey, is a director of DEPL. Both George Newberry, the plant manager of DEPL and John Vanderlaan, the plant manager of Diversey report to Howard Hansuld; the former reports to Hansuld as director and general manager of DEPL; and the latter reports to him as vice-president in charge of production for Diversey. Mr. Hansuld reports to Mr. Peck as president of Diversey and to the DEPL board of directors.

5. The evidence establishes that the two corporations do not interact on a functional level and that they operate for the most part autonomously. Although both plant managers report to Mr. Hansuld, they have, apart from the occasional discussion regarding emergency procedures (in case of a need for evacuation of the area) no involvement with each other. There is no consultation regarding the direction of the work force or the setting of wage rates. The Diversey budget committee includes among its three members Peck and Norrie, as does the budget committee of DEPL which also includes a representative from Dow Chemicals. Mr. Hansuld is not on either budget committee. Newberry and Vanderlaan are required to consult with Hansuld on major problem areas (e.g. major production problems, capital expense and staffing requirements). However, the day to day management of the enterprises, including the establishment and administration of labour relations policy, is left entirely in their hands. The plant managers have no authority in the area of pensions, vacations and statutory holidays. These matters are set by the Diversey and DEPL boards of directors.

6. There has been no interchange of employees from one enterprise to another. The Board was informed that at the time DEPL commenced production – in late 1974 – only four of the two hundred applicants for employment were from Diversey and that of these, only one possessed the required educational qualifications and experience. At that time, as now, job vacancies at DEPL are not posted at Diversey, and no steps are taken to bring such vacancies to the attention of employees.

7. Although each company has its own office, the payroll cheques for DEPL employees bear the name Diversey. These cheques are prepared on a computerized system provided by the Royal Bank. The Board was informed that since DEPL has at this time only twenty employees on payroll, it is not practicable to computerize it as a separate unit. It was not suggested, however, that there is any confusion among employees as to whom they work for. DEPL employees pick up their pay cheques at the DEPL office, a rented trailer which is located on the DEPL grounds. Applications for employment are made at the respective company offices and on separate application forms. All accounts except for payroll are paid on separate cheques. DEPL and Diversey have completely separate banking arrangements.

and there are no joint arrangements for bulk buying. Diversey does, however, provide accounting services for DEPL which does not as yet have its own accounting department. It also picks up mail from the post office which is then picked up by DEPL from the Diversey mailroom. All shipments of parts, however, come directly to the DEPL office trailer. The two companies keep separate books and file separate income tax returns.

8. Section 1(4) of The Labour Relations Act reads as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

In *Industrial-Mine Installations Limited* [1972] OLRB Rep. Oct. 1029, the Board had this to say about the types of situations for which section 1(4) was designed as a remedy:

Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union

segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented.

Before the Board may exercise its discretion under section 1(4), there are three conditions which must be found to exist. In addition to the obvious requirement that there be more than one business entity involved in the application, the section requires that the business entities be both “associated or related” and under “common control or direction”. The need for these latter two requirements is not difficult to understand. Section 1(4) allows the Board to pierce the corporate veil in order to avoid the types of situations outlined in *Industrial-Mine*. It is not designed to bind independent or unrelated enterprises. In deciding whether the statutory prerequisites have been satisfied, the Board has regard to a broad range of industrial relations considerations, some of which may overlap in their relevance to the various issues, and all of which may vary in importance depending upon the particular fact situation at hand.

9. It is clear in the instant case that the first condition necessary to the application of section 1(4) by the Board has been met. There is more than one business entity involved. It is clear also that the presence of common directors and officers is, together with the existence of common financial control, sufficient to allow for a finding that the two corporations are under “common control and direction.”

The evidence, however, does not support the conclusion that the two corporations are associated or related within the meaning of section 1(4). The evidence is that the two companies, which operate out of separate and self-contained premises, and produce different products for a different market, are not integrated in a functional sense and that responsibility for the day to day management of the operations resides exclusively in the plant managers who do not interact. There is no history of interchange between employees of the two enterprises; nor is there reason to believe that such interchange will occur. There is, moreover, no evidence that there exists in the minds of employees confusion about whom they work for or that there have been representations to the public which would indicate an associated or related existence. In these circumstances, the Board is unable to attach any significance to the use of a common payroll system and accounting services.

10. The Board finds that Diversey (Canada) Limited and Diversey Environmental Products Limited are not associated or related within the meaning of section 1(4) of The Labour Relations Act, and, accordingly, that they may not be treated as one employer.

11. It should be stated that had we found otherwise, it would then have been necessary to determine whether a unit composed of employees of both companies was appropriate for collective bargaining. In deciding that question, the Board would have been guided by the usual considerations of appropriateness.

12. Having regard to the description agreed upon by the parties, the Board finds that all employees of Diversey (Canada) Limited, at the City of Mississauga, save and except foremen, persons above the rank of foreman, sales staff, office, clerical and technical employees, persons employed for not more than 24 hours per week and students employed

during the school vacation period, constitute a unit of employees appropriate for collective bargaining. For purposes of clarity, the Board notes the agreement of the parties that "technical" includes research and development, quality control, equipment design, and assembly.

13. The Board finds that more than fifty-five per cent of the employees of the respondent in the above described bargaining unit, at the time the application was made, were members of the applicant on July 25, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant in respect of the above described bargaining unit.

15. Having regard to the description agreed upon by the parties, the Board finds that all employees of Diversey Environmental Products Limited at the City of Mississauga, save and except foremen, persons above the rank of foreman, sales staff, office, clerical and technical employees, persons employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

16. The Board finds that less than forty-five per cent of the employees of the respondent in the above described bargaining unit, at the time the application was made, were members of the applicant on July 25, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. Accordingly, the application insofar as it relates to the employees of Diversey Environmental Products Limited is dismissed.

18. There was filed in this case a statement of desire in opposition to the application. Because that statement could not have affected the applicant's right to be certified as bargaining agent for the employees of Diversey (Canada) Limited and because the applicant does not possess the required membership support for a representation vote in the unit found appropriate for the employees of Diversey Environmental Products Limited, the statement of desire has not been inquired into by the Board.

0754-78-R International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, Applicant, v. **Durham Transport Inc.**, L. E. Walker Respondents, v. Group of Employees, Objectors.

Successor Status – Union certified in federal jurisdiction – business subsequently sold and converted to wholly intra-provincial operation – No continuation of bargaining rights in provincial jurisdiction.

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Douglas J. Wray and John S. McCafferty for the applicant; D. I. Wakely and R. K. McClelland for the respondent, Durham Transport Inc.; Rodney D. Dale and Larry Walker for the respondent, L. E. Walker Transport Limited; and Michael R. Mitchell for the objectors.*

DECISION OF THE BOARD; September 15, 1978.

1. This is an application under section 55 of The Labour Relations Act.
2. The application concerns the bargaining rights of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141 as a result of a sale of a business by Durham Transport Inc. to L. E. Walker Transport Limited alleged to have taken place on or about the 18th of May 1978.
3. The applicant requests a declaration from the Board that a sale of business has taken place within the meaning of section 55 of The Ontario Labour Relations Act and an order that, as a result, the successor employer L. E. Walker Transport Limited is required to bargain with the applicant with a view to making a collective agreement pursuant to the requirements of the Act.
4. The two respondents agree that a sale from Durham to Walker is complete in all respects except for a decision awaited from the Ministry of Transport for Ontario regarding the granting of the appropriate license or licenses to Walker Transport. Within seven days after a decision issues favourable to Walker, the sale will have been consummated in full. They further agree that Walker has been the active manager of the business during 1978 prior to the making of this application. The respondent Walker agrees that its operations are limited to the Province of Ontario and therefore its employees would fall within the jurisdiction of The Ontario Labour Relations Act.
5. All three parties agree as follows:
 - (a) The bargaining rights in question are for a group of employees comprising all employees of Durham Transport Inc. operating at or out of Aylmer Ontario, excluding the terminal manager and office staff.
 - (b) These rights flow from a certificate issued July 29, 1977 by the *Canada Labour Relations Board*.
 - (c) No collective agreement has been concluded between the respondent Durham and the applicant since the granting of that certificate.

- (d) If the sale is concluded, the key question before the Board is whether it is a sale of a business within the meaning of section 55 of The Labour Relations Act of Ontario.

The facts concerning the business transaction itself are not, therefore, in dispute. Durham, a federally regulated interprovincial carrier has sold off a part of its business to Walker which has continued to operate that part intra-provincially. In essence there has been a transfer not only from Durham to Walker, but also from the federal to the provincial jurisdiction because of the change in the nature of the business which accompanied the sale. The applicant seeks a continuation of the bargaining rights based upon its federal certificate. The respondents deny that section 55 of the Ontario Act can preserve the effect of a federal certificate; and alternatively that, the Board should hold a representation vote to ascertain the wishes of the employees.

6. The applicant acknowledges that it has made application for a similar declaration under section 144 of the Canada Labour Code. It gives a two-fold reason for making application to this Board. Firstly, Durham opposed the application to the Canada Board on the grounds that that Board did not have jurisdiction to hear the application because the successor employer would fall within the jurisdiction of The Ontario Labour Relations Act. Secondly, the Canada Board in its decision re Canadian Pacific Ltd. [1978] 1 Canadian LRBR declined to make a declaration under circumstances similar to those present here.

The applicant argues that a provincial authority under which the successor employer falls must seize jurisdiction in order to protect the bargaining rights in question or there would be a serious gap in the various legislative jurisdictions in respect of the preservation of bargaining rights. The applicant submits that, where the employees now come within the provisions of The Ontario Labour Relations Act, this Board has jurisdiction to declare that the trade union continues to hold bargaining rights for them. The applicant contends that nothing has changed except the constitutional character of the employer and, therefore, the employees should not lose their right to be represented by the applicant.

7. The relevant provisions of a section 55 read as follows:

“Section 55(2): Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the persons to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the persons to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application. R.S.O. 1970, c. 232, s. 55(1, 2).

Section 55(3): Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the

bargaining agent for the employees of the persons to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give the persons to whom the business was sold a written notice of its desire to bargain with a view without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 34, as the case requires. 1975, c. 76, s. 15(1).

9. The Board sees the issue before it not so much one of constitutional jurisdiction but rather one of whether the applicant in this case meets the conditions precedent for an application under section 55. It becomes necessary, then, to interpret the section in order to determine if those conditions are met. The Board has dealt previously with this type of problem in *re The Municipality of Metropolitan Toronto* 1975 OLRB Rep. October 777. There an ambulance service was transferred from the public to the private sector and consequently from the purview of the Crown Employees Collective Bargaining Act to that of The Labour Relations Act. The Union sought a declaration that the transferee continued to be bound by an agreement previously negotiated with the Crown. The Board held that it could not continue the union's rights because both employers were not covered by The Labour Relations Act. The Act could not apply across a legislative boundary. In support of that finding it reasoned that:

- (a) The words in section 55(2) "where an employer sells his business while an application for certification ... to which he is a party before the Board ..." clearly means an application before this Board and not a Board of some foreign jurisdiction; and
- (b) Similarly, the words in section 55(3) "Where an employer on behalf of whose employees a trade union ... has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45 sells his business, ..." refers to the giving of notice under sections of The Ontario Labour Relations Act and not some other statutory jurisdiction.

This reasoning makes it clear that the only bargaining rights being preserved by section 55 are those held under the jurisdiction of The Ontario Labour Relations Act. It would be completely incompatible with the reasoning in that case, even though it does not deal with bargaining rights held by certification only, to say that the words "... a trade union ... has been certified as bargaining agent ..." appearing in section 55(3) includes a trade union which has been certified in another jurisdiction.

10. For all of the above reasons, the Board finds that it is a precondition for an application under section 55(3) that a trade union which is seeking to preserve certified bargaining rights must have obtained these rights from this Board. In so finding, the Board confirms applicant counsel's expressed concern that there is a gap in the legislation in respect to preservation of bargaining rights when the sale of a business takes place between two employers whose bargaining relationship with their employees is governed by different legislative or statutory jurisdictions. However, that is not a problem which this Board has the power to cure; rather it is a problem that would have to be dealt with by the appropriate legislative authority.

11. The application is dismissed.
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1061-77-R Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. Limestone Quarries Division of King Paving and Materials, A Division of the **Flintkote Company of Canada Limited**, (Respondent).

Certification – Employee – Whether subject employees are dependent contractors or independent contractors – Owner operators found employees where no independent business initiative, terms unilaterally set by employer, and operators integral part of employer's business.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D. B. Archer and J. D. Bell.

APPEARANCES: *Philip J. Wolfenden and Lyle Nunn for the applicant; B. R. Baldwin and D. L. Barnes for the respondent.*

DECISION OF THE BOARD: September 18, 1978.

1. This is an application for certification.
2. The parties are in dispute as to whether there is a bargaining unit appropriate for collective bargaining. The respondent employer takes the position that those for whom the union seeks bargaining rights are not employees within the meaning of the Act whereas the applicant argues that these persons are dependent contractors and hence employees within the meaning of the Act. In a decision dated November 2, 1977 the Board appointed Mr. C. F. Robicheau, Labour Relations Officer, to meet with the parties and inquire into the relationship between the respondent employer and the persons on whose behalf the union seeks bargaining rights. The Board is in receipt of his report and has entertained the representations of the parties as to the conclusions which the Board should draw from the evidence set out in the report.
3. The parties are agreed that if the Board should find a unit of employees appropriate for collective bargaining the number of employees in the bargaining unit as of the date of the application was five.
4. After the examination of two of the five persons whom the union claims are dependent contractors, the Labour Relations Officer inquired of the parties if their evidence could be taken as representative. In the absence of formal agreement the officer took it upon himself to issue a report on the evidence obtained. Neither party objected.
5. Section 1(1)(ga) of the Act defines a "dependent contractor" as follows:

“‘dependent contractor’ means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.”

Section 1(1)(gb) provides that “employee” includes a dependent contractor.

6. In interpreting the dependent contractor section of the Act, the Board has rejected the argument that these sections represent a codification of previous Board decisions in which common law tests were applied in order to distinguish “employees” from “independent contractors”. Instead, the Board has viewed the statutory definition as “a new point of departure” which may imply that persons who have previously been denied access to collective bargaining may now be brought within the ambit of the Act. (See *Adbo Contracting Company Ltd.* [1977] OLRB Rep. April 197.) While common law considerations may be important, the Board’s ultimate responsibility is to make its determination on the basis of the statutory definition set out above. The Board’s task –

“... is to make the determination by reference to the criteria set-out in the statutory definition of dependent contractor. This definition directs the Board to examine the type of economic dependence and the kind of business relationship or obligation that it has before it, and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment and whether or not a person furnishes his own tools, vehicles, equipment or machinery. In the final balance the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than of an independent contractor.”

(See re *Superior Sand & Gravel*, [1978] OLRB Rep. Feb. 119 at p. 126.)

7. The Board has reviewed the evidence before it in this matter and is satisfied that the persons on whose behalf the union seeks bargaining rights are economically dependent upon the respondent. *Firstly*, it is evident that the owner/operators in this case have tied their fortunes to Limestone Quarries. The bulk of their income, on an individual basis, is derived from work done in connection with Limestone Quarries. During the non-winter months these owner/operators report to Limestone Quarries on a daily basis and work exclusively for Limestone. In the winter months some of the owner/operators contract to do snow removal and may be unavailable to Limestone for short periods of time. Snow removal, however, is carried on when the level of business at the Limestone pit is usually low and the inconvenience to Limestone is minimal. Having regard to the small proportion of the individual’s annual income derived from snow removal as compared to hauling for Limestone, and to the fact that the owner/operators do not let their services to other quarries or to other customers, the Board views the snow removal work as being in the nature of a seasonal supplement and not as a factor which removes these persons from economic depend-

ence upon Limestone Quarries. *Secondly*, the absence of entrepreneurial or business initiative by the owner/operators underscores their economic dependency upon Limestone. The owner/operators do not advertise, or solicit business. There is no evidence of an attempt by these persons to extend their business horizons beyond Limestone and the snow removal work referred to above. The failure of these persons to promote themselves by means of "yellow pages" advertising is indicative of their total lack of entrepreneurial initiative. Limestone has its own sales force and it is through the endeavours of Limestone that work flows to the owner/operators. *Thirdly*, although there may be some consultation, the ton-mile rate is unilaterally set by Limestone and is not a matter of negotiation between the parties. The owner/drivers are paid bi-weekly on the basis of the number of deliveries at the ton-mile rate set by the company. The risk of non-collection rests with Limestone as the driver is paid for the materials delivered. On the basis of these factors the Board is satisfied that the owner/operators are economically dependent, as the Board has used that term upon Limestone Quarries. The finding of economic dependence, however, is not dispositive of the matter. The question before the Board is whether the subject persons are "dependent contractors" within the meaning of section 1(1)(g) of the Act; and this determination requires an application of the section to the relationship in its totality, not simply a determination that the owner/operators are dependent upon the Respondent.

8. The owner/operators in this case own their own trucks and are responsible for acquiring the necessary licences to operate. Limestone has not assisted with the purchase of vehicles or with the obtaining of licences. It goes without saying, however, that ownership of a suitable vehicle and licence is a necessary prerequisite to working from the limestone quarry. Although the Board has found in some cases that company involvement in the purchase of a vehicle and its licensing is indicative of an employer/employee relationship the absence of company involvement does not necessarily remove these owner/operators from the scope of the Act. The Act contemplates that persons owning the necessary tools may be dependent contractors within the meaning of the Act and consequently, ownership cannot in and of itself deprive a person of employee status under the Act.

9. The drivers at Limestone are under less direct control and supervision than that exhibited over the owner/operator drivers in a number of other applications which have been brought before the Board. The drivers are not told when to come in or when they may leave. They are not required to haul a minimum tonnage per day. There is no evidence that the company has ever disciplined any of its owner/operator drivers. The Board, however, is not persuaded by the lack of direct control and supervision that these persons more closely resemble independent contractors than employees. The evidence establishes that the owner/operator drivers do work regularly, do not take more time off than would an employee and have not given the company serious cause to discipline. The system appears to have worked reasonably well for both the company and the owner/operators with the result that the company has had little need to exhibit tighter control.

10. The balance of authority, however, rests with the company. In the absence of any formal contract between the company and the owner/operator, the company controls access to the work which is the predominant source of income for the owner/operators. Just as under the common law an employer may unilaterally terminate the services of an employee, so also may the company in this case unilaterally forbid an owner/operator from working at its quarry. In the absence of a contractual arrangement between the owner/operator and the company setting out the terms of access to the quarry, the company is free to limit ac-

cess at any time and thereby undermine the operators' primary source of income. Indeed, it is established that if an owner/operator does not maintain a \$500,000 public liability insurance policy, he will not be permitted to work. The company has set this requirement and has the power to enforce it. Notwithstanding the absence of direct control and supervision, the nature of the relationship is such that the company enjoys a power of indirect control over those who are dependent upon it for their livelihood. The authority enjoyed by the company in this regard is similar to its common law power of unilateral termination over an employee.

11. In *Canada Crushed Stone* [1977] OLRB Rep. Dec. 806, the Board considered an application for certification submitted by persons who themselves hired drivers. The Board, in dismissing the application, stated:

"... [there is a] qualitative difference between the contractor who derives income from the labour of others and the contractor who does not. The Board takes the view that the line must be drawn so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the Act they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of The Labour Relations Act."

(See also *Superior Sand, Gravel & Supplies Limited*, [1978] OLRB Rep. Feb. 119.)

12. In the instant case the evidence establishes that some of the owner/operators have employed substitutes to drive their vehicles while on vacation and one owner/operator – Mr. C. Cole, hired two drivers to drive his truck on a permanent basis while he worked elsewhere. He discontinued the arrangement when it did not work out. It must be made clear that none of the owner/operators was an employer in his own right as of the date of this application and none, therefore, are affected by the ratio of the *Canada Crushed Stone* (supra) decision in respect of their status as of the date of this application.

13. Even if the owner/operators in this case had been using temporary replacements as of the date of this application, it is doubtful if their infrequent use would cause the Board to alter its view as to the essential nature of the relationship. In both the *Consolidated Sand and Gravel* case (supra) and *Superior Sand, Gravel & Supplies* case (supra) the fact that a driver(s) on occasion found it necessary to employ a temporary substitute did not affect the finding of a dependent contractor relationship. Just as an employee may, in some situations, provide a replacement so also an owner/operator may do the same thing without altering the nature of his relationship with the company.

14. Turning to Mr. Cole. If Mr. Cole had been the employer of two regular drivers on the date of this application the Board would have found that the entrepreneurial aspect of his business denied him access to the procedures and protection of the Labour Relations Act. His decision to hire permanent drivers changed the fundamental nature of his business for the period he was an employer.

Although Mr. Cole was an owner/operator, the same as the other owner/operators, and not an employer in his own right as of the date of this application, the Board must nevertheless consider the fact that he possessed the ability to hire others and that those he hired were allowed to haul from the quarry, in assessing the nature of his relationship with the company. The potential to hire a permanent driver is an option open to all owner/operators and must be characterized as a neutral fact in assessing the nature of the relationship between the owner/operator and the company. The company's decision to allow the hired drivers to haul may be supportive of the conclusion that the owner/operators were not under an obligation to perform duties for the company but could have others do the work in their place. When the evidence is considered in its entirety, however, the Board must conclude otherwise. Having regard to the element of indirect control enjoyed by the company, to the fact that the owner/operators reported on a regular basis and performed the required work assignments and usually took it upon themselves to call in and advise the company when sick or unavailable for work, the Board concludes that the owner/operators were under an obligation to perform duties for the company and did in fact perform these duties on a regular and continuing basis. The use of Mr. Coles' drivers evidences a preparedness by the company to deal with other than owner/operators but when considered in light of all the evidence does not alter the essential nature of the relationship between the company and the owner/operators for whom the union seeks bargaining rights.

15. Having regard to all of the evidence, the Board is satisfied that the owner/operators in the instant case are in a position of economic dependence upon, and are under an obligation to perform duties for the respondent, more closely resembling the relationship of an employee than an independent contractor. These persons are dependent contractors within the meaning of the Act.

16. The Board finds that all dependent contractors owner/operators working at or out of the respondent's pit at Rouge Valley yard, Milliken, Ontario, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 13, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

0552-78-R Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, (Applicant), v. Ontario Food Division (**Food City**) of the Oshawa Group Limited, (Respondent).

Certification – Bargaining Unit – Board certified an all employee unit in a chain store meat department and excluded part time employees and students from the unit

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

APPEARANCES: *Harold F. Caley and Joseph O'Donnell for the applicant; G. Grossman, C. Candy, E. Koenig and C. Hardy for the respondent.*

DECISION OF THE BOARD: September 6, 1978.

1. The name: "Oshawa Group Limited, Ontario Food Division, trading as Food City" appearing in the style of cause of this application as the name of the respondent is amended to read: "Ontario Food Division (Food City) of the Oshawa Group Limited".

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. The applicant is seeking certification with respect to a bargaining unit of "all meat department employees of the respondent in its stores in the Municipality of Niagara Falls, save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". The respondent has adopted the position that the appropriate bargaining unit is "all employees of the respondent in its Niagara Falls Food City store, in the Municipality of Niagara Falls, save and except the store manager, department managers, office staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods".

4. The respondent argues that the all employee unit is more appropriate because all employees are paid by hourly wage and receive the same benefits. The respondent also alleges that there is an ongoing interchange between its various departments (including the meat department). The respondent points out that the store is managed as one unit. When questioned about the nature of the ongoing interchange, the respondent conceded that there would be a minimum of interchange with respect to the meat cutter and that the meat wrapper would be more frequently engaged in interchange between departments.

5. As early as 1962, the Board made the following observations in the *London Food City* case, [1962] OLRB Rep. August, p. 151-2:

The applicant has applied to be certified as bargaining agent for all meat department employees of the respondent in its store in Westminster Township. The respondent employs in its meat department three full time employees and four persons employed for not more than 24 hours per week.

The Board has inquired into the history of applications made by, and the collective agreements entered into with, the Amalgamated Meat Cutters and Butcher Workmen of North America with respect to supermarket employees.

It appears from the Board's records that the Amalgamated Meat Cutters and

Butcher Workmen of North America has consistently applied for three separate and distinct bargaining units in supermarkets and accordingly has bargained for three separate bargaining units which may generally be described as follows:

- (a) all employees in the meat department, save and except persons employed for not more than 24 hours per week, and students hired for the school vacation period.
- (b) all employees in the store, save and except the meat department employees, persons regularly employed for not more than 24 hours per week, students hired for the school vacation period and persons exercising managerial functions.
- (c) all employees in the store employed for not more than 24 hours per week and students hired for the school vacation period.

In that case the Board certified Local 633 of the Amalgamated Meat Cutters and Butcher Workmen of North America as the bargaining agent of "all employees of London Food City in the meat departments of its stores in Westminster Township, save and except persons employed for not more than 24 hours per week and students hired for the school vacation period". The Board also noted that in view of the foregoing, part-time employees of London Food City in its meat department do not constitute an appropriate bargaining unit and that it would not be appropriate to include them in the bargaining unit which had been found to be appropriate.

6. The Board has regularly followed this pattern of appropriate bargaining units in retail food outlets. The decision of the Board in the *L & W Distributors Ltd. carrying on business as N & D Supermarket* case, [1970] OLRB Rep. Feb. pp. 1343, 1344, dismissed an application for certification with respect to a unit of all meat department employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and relied upon the *London Food City* case, *supra*. However, the Board in that case went on to make certain observations with respect to craft units. It is clear that these observations must be regarded as *obiter dictum* and were based, as the Board stated, on the particular circumstances of that application. There is no indication of the particular circumstances of that application.

7. The respondent relied upon the *Inland Publishing Co. Limited* case, [1969] OLRB Rep. March, p. 1341. This case states that the Board's usual policy is not to exclude "24 hour people" or students from a craft unit. As a general proposition it correctly describes the Board's policy with respect to crafts units. The applicant, however, has a long history of bargaining for units of employees in meat departments which exclude persons who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period(s). In the circumstances of this application there is nothing to indicate that the bargaining unit set forth in the application is inappropriate for collective bargaining. The proposal by the applicant that the bargaining unit be defined in terms of "its stores" rather than at a specific store is in accordance with the Board's practice of defining such bargaining units in terms of "its stores" in a given municipality regardless of whether the respondent has one store or more than one store. Conversely, where a respon-

dent has more than one store in a given municipality the appropriate bargaining unit is defined in terms of all of its stores in a given municipality.

8. Ms. B. McLean, Examiner, is authorized to inquire into and report to the Board on (a) the list of employees filed by the respondent, (b) the duties and responsibilities of the person classified as meat manager, and (c), the degree of interchange, if any, between the employees in the meat department and other employees of the respondent.

1162-76-U United Garment Workers of America, (Complainant), v. Four B Manufacturing Ltd., (Respondent).

S-79 – Practice and Procedure – Board finding that employees illegally discharged and ordering reinstatement – Board decision sustained in Divisional Court and Court of Appeal – Board refusing to stay enforcement of order pending further appeal

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: *Andre Bekerman and K. A. Thomson for the complainant; J. T. Beamish for the respondent.*

DECISION OF THE BOARD: September 8, 1978.

1. In this application the complainant trade union alleges employer non-compliance with a Board order contained in a decision dated February 3, 1977.

2. In late 1976 the complainant in this matter filed an application for certification and a concurrent complaint under section 79 of The Labour Relations Act alleging employer violation of sections 56, 58(a), (c), 61 and 71 of the Act. The jurisdictional competence of the Board to deal with these matters was raised by the respondent and was exhaustively dealt with by the Board in the certification matter. In a decision dated December 17, 1976, Board File No. 1126-76-R, the Board found that it had jurisdiction and proceeded to certify the applicant. Another panel of the Board considered the merits of the complaint brought under section 79 of the Act and in a decision dated February 3, 1977, found that the respondent had violated The Labour Relations Act. The remedial order of the Board in that case was framed as follows:

The Board therefore directs that the grievors be reinstated forthwith with compensation for loss of wages and other benefits subject to the usual deductions. The Board shall remain seized in the event of a failure to implement this decision.

It is this order which the complainant alleges has not been complied with.

3. The respondent sought judicial review of the Board's decision to assume jurisdic-

tion in these matters arguing that a manufacturing operation located upon an Indian reserve is properly the subject of Federal labour relations jurisdiction. In a decision dated June 29, 1977, a majority of the Ontario Divisional Court upheld the Board's determination that *The Labour Relations Act* applied to the respondent. The majority decision of the Divisional Court was subsequently upheld by the Ontario Court of Appeal in a decision dated June 28, 1978. The respondent is presently seeking leave to appeal to the Supreme Court of Canada and that application for leave is scheduled to be heard in October.

4. It is not disputed by the respondent company that the Board's order as set out in paragraph 15 of its February 3rd, 1977 decision and as reproduced in paragraph 2 herein, has not been complied with. The respondent employer takes the position that in the face of the ongoing appeal the Board should proceed as if the matter was an award for damages made in a civil procedure and implement a stay of its order pending a decision of the Supreme Court of Canada. Counsel for the respondent argues that if the company is forced to pay damages and is later successful in its attempt to overturn the decision it will be difficult to recover the monies paid out. He argues further that in the absence of any evidence to indicate prejudice or immediate hardship to those whom the Board ordered reinstated, the Board should not require their reinstatement at this time.

5. A recent bargaining in bad faith charge was filed by the applicant union in respect of the failure of the respondent company to bargain with it with a view to concluding a collective agreement. In that case the respondent also raised its objection to the Board proceeding so long as proceedings were before the Supreme Court of Canada. The Board in deciding to hear the complaint described the practice of the Board in these circumstances in the following terms:

The Board's practice has been to determine in the circumstances of each particular case whether the balance of convenience dictates whether it should proceed to hear a matter or wait until the jurisdictional issue has been resolved by the Courts. Such an approach has received judicial approval in *Cedervale Tree Services Ltd. v. Labourers' International Union of North America, Local 183* (1971), 71 CLLC ¶ 14,087 (Ont.C.A.).

The Court said in the *Cedervale Tree Service decision* (supra) at p. 383

It is also clear law that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of *certiorari* or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction.

6. The Board rejects the respondent's submissions that it should stay the enforcement of its order in the face of the continuing appeal. The Board, having asserted its constitutional jurisdiction in this matter and having been upheld by both the Divisional Court and the Court of Appeal and having found that the respondent unlawfully interfered with the rights of its employees and of the trade union, is of the view that on the balance of consideration the Board should proceed as it normally would under section 79(5) of the Act in

providing for the enforcement of its order. The irreparable damage which might be done to the legitimate rights and expectation of both the employees and the trade union if the Board were to defer to the respondent's non-compliance overrides the concerns expressed by counsel for the respondent. The order is legally binding and enforceable and the Board is not prepared to vary, amend or otherwise alter it. (See re *International Woodworkers of America and Patchogue Plymouth Hawkesbury Mills* (1976) 14 O.R.(2d) 118, where the High Court found that the enforcement of an arbitration award made binding on the parties under section 37(9) of The Labour Relations Act is not automatically stayed on the filing of an application for judicial review and remains binding and enforceable until an interim order of the court staying the enforcement of the award is granted.)

7. The Board framed its initial order in general terms in the expectation that the parties would work out the specific amounts. The Board, however, remained seized in the event of a failure to implement the decision. Prior to the non-compliance hearing, the trade union had not performed the calculations necessary for determining the exact amounts owing. If the parties are unable to agree and notify the Board of the amounts owing within seven days of the release of this decision the matter will be put on for hearing in order to determine the issue and the Registrar is so directed.

No. 1332-77-R Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union, (Applicant), v. **Frito-Lay Canada Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Bargaining Unit – Collective Agreement – Employee – Union certified for unit and subsequently executing agreement excluding some of the employees – Agreement may alter unit but union loses bargaining rights for excluded employees – Persons with regular access to confidential information integral to bargaining process excluded from unit

BEFORE: Donald D. Carter, Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Charles McCormick and Mary Armstrong for the applicant; James B. Noonan, Guy Dalcourt and Lloyd Simmonds for the respondent; Samuel R. Rickett for the objectors.*

DECISION OF THE BOARD: September 15, 1978.

1. This is an application for certification.
2. The board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.
3. The applicant seeks a bargaining unit of "all office staff". This proposed unit does not include six laboratory technicians and one quality control supervisor whom the applicant claimed were covered by existing bargaining rights that it had acquired earlier. The respondent, on the other hand, argued that, since these seven employees had been excluded

from the coverage of any collective agreement, there were no extant bargaining rights relating to them so that they should be included in the proposed unit. At the examiner's hearing the parties agreed that the Board should determine this issue on the basis of the information contained in the file. It was further agreed that, if the Board were to find that this group of employees were not covered by the bargaining rights held by the applicant, then these employees were to be considered as sharing a community of interest with the proposed office and clerical staff.

4. The issue for the Board to decide, then, is whether the seven technical employees are covered by existing bargaining rights. It is undisputed that the Retail Clerks International Association was certified as the bargaining agent of "all employees of Raymond's Nut Shops Limited at Kitchener, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period" on February 28, 1968, and that a second certificate was issued to this union, on July 17, 1968, covering "all employees of Raymond Snack Foods Limited at Kitchener, save and except foremen, persons above the rank of foreman, office and sales staff, and persons covered by the Board's certificate dated February 28, 1968. ...". It is further acknowledged that the respondent is the successor employer to Raymond's Nut Shops Limited and Raymond Snack Foods Limited. There was entered into evidence a document purporting to be a copy of an agreement between Raymond Snack Foods Limited and the Retail Clerks Union, Local 206, made the 1st day of June, 1968. No evidence was introduced to suggest that this document was other than what it purported to be. The recognition clause of this document was worded in the following terms: "The company recognizes the Union as the bargaining agent of all its employees at Kitchener, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period, and it is mutually agreed and understood that the bargaining unit does not include plant clerical employees, quality control technicians, laboratory technicians, the head receiver or the head shipper." There is currently in operation a collective agreement between the respondent and the applicant expressly excluding from the bargaining unit, among others, "plant clerical employees, quality control technicians, laboratory technicians. ...".

5. A certificate issued by the Board initially defines the scope of the bargaining rights acquired by a trade union, imposing a corresponding obligation upon an employer to bargain to the extent of these bargaining rights. This obligation, however, does not preclude the parties in bargaining from agreeing to some alteration of the bargaining unit established by the Board. Since bargaining units found to be appropriate by the Board are themselves often the product of an agreement of the parties, it would be somewhat inconsistent for the Board to treat its bargaining unit descriptions as being immune from alteration by subsequent agreement of the parties. The Board's bargaining unit descriptions are not carved in stone, and the parties may alter them by agreement, provided that there is no breach of the duty to bargain in good faith or the duty of fair representation.

6. The Board has expressly recognized that, once a collective agreement is made, the source of bargaining rights shift from the certificate to the agreement itself. As the Board stated in *Gilborco Canada Ltd.*, [1971] OLRB Rep. Mar. 155, "in effect the collective agreement supplants the rights contained in the certificate and the Board's certificate is spent once the collective agreement is signed". This means that where employees, originally included in the Board's certificate, are subsequently excluded from the scope of the collective agreement, the bargaining agent cannot be said to have retained any bargaining rights in respect of these employees. See *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. Jan. 379.

7. In this case, it is clear that the laboratory technicians and quality control technicians are excluded from the scope of the existing collective agreement between the respondent and the applicant. It is this collective agreement that now defines the scope of the applicant's existing bargaining rights, and not the original certificate. The Board, therefore, concludes that the six laboratory technicians and the one quality control supervisor are not covered by bargaining rights held by the applicant, and, in light of the agreement of the parties, they must be included in the proposed bargaining unit.

8. There remains in dispute between the parties the question of whether the two payroll clerks (one full-time and the other part-time) should be excluded from the bargaining unit and the one secretary/receptionist should be excluded from the bargaining unit because they are employed in a confidential capacity in matters relating to labour relations. The approach taken by the Board in determining whether a person is excluded from collective bargaining on this ground was set out in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379, at p. 388

Similar criteria apply to persons alleged to be employed in confidential capacities in matters relating to labour relations. A person to be excluded under this provision must be employed "in a confidential capacity", i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

9. It follows that the Board in this case is required to examine the facts as set out in the examiner's report to determine whether the three employees are in fact employed in a confidential capacity in matters relating to labour relations. In answering this question the Board must take into account the fact that the nature of the work performed by office and clerical employees means that they will be privy to information not available to their counterparts in the plant. If the Board were to apply the confidential exclusion too widely it would mean that a large number of such employees would be excluded from the benefits of collective bargaining. For these employees to be excluded, therefore, the Board must be convinced that they have regular access to confidential information, and that this information is integral to the collective bargaining process.

10. The evidence indicates that the payroll clerks maintain the individual files of both the plant employees and the office employees. These clerks file any material relating to the disciplining of employees, any material relating to grievances that might be lodged, any information relating to merit increases, and, on occasion, probationary assessments and medical assessments. These clerks prepare a monthly report setting out the total hours worked in each department for the month, and also a weekly manning report setting out the number of employees working in the plant during the week. As well, these clerks prepare the payroll and distribute the pay cheques to supervisors for further distribution. The clerks also assist

in the preparation of a year-end report setting out all pertinent payroll information for the year. During negotiations the payroll clerks are sometimes requested to supply certain information concerning the payroll.

11. While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial relations strategy, and the Board must conclude that these employees are not employed in a confidential capacity in matters relating to labour relations.

12. The receptionist/secretary, on the other hand, has regular access to a much different kind of confidential information. This person does all the correspondence for the plant manager. Included in this correspondence is a weekly letter from the plant manager to the respondent's head office in Toronto – covering all aspects of the management of the plant. On the evidence it would appear that this person is privy to information relating to the respondent's industrial relations strategy. If this person were not excluded from collective bargaining, it would appear that there would be no one outside the bargaining unit who could prepare correspondence for the plant manager. As the Board has stated, "discreet secretarial help is essential to any employer and that is manifestly so in labour relations." See *The Regional Municipality of Haldimand-Norfolk (Norview Home for the Aged)*, Board File No. 2193-76-R (July 8, 1966). Accordingly, the Board concludes that the secretary/receptionist is employed in a confidential capacity relating to labour relations.

13. The Board finds that all office, clerical and technical employees of Frito-Lay Canada Limited at its premises in Kitchener, save and except office manager, quality control manager, persons above the rank of manager and quality control manager, and the secretary/receptionist, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is satisfied on the basis of all the evidence before it that not less than 45 per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 30, 1977, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

16. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

17. The matter is referred to the Registrar.

0541-78-M Genstar Chemical Limited, (Employer), v. International Chemical Workers Union, Local 721, (Trade Union), v. Canadian Chemical Workers Union, (Intervener).

Reference – Collective Agreement – Arbitration – Employer failure to remit union dues during currency of collective agreement – Agreement subsequently terminated by certification of second union – First union failing to file grievance prior to expiry of agreement – Expiry of agreement no bar to filing grievance or constituting board of arbitration.

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *Corinne Murray and K. LeBlanc for the employer; Alick Ryder for the trade union; Daniel Ublansky and William Adams for the intervener.*

DECISION OF THE BOARD: September 15, 1978.

1. The Minister has referred to the Board, pursuant to section 96(1) of The Labour Relations Act, the question as to whether the Minister has authority under section 37(4) of the Act to appoint a person to constitute a board of arbitration under a collective agreement.
2. The facts are not in dispute. International Chemical Workers Union, Local 721 was party to a collective agreement with Genstar Chemical Limited, the employer in this matter, effective June 21, 1975 to June 20, 1977. On April 21, 1977, the Canadian Chemical Workers Union, the intervener, made application to the Board to displace Local 721 as bargaining agent of the employees defined in the agreement. On April 25, the trustees of Local 721 placed Local 721 under trusteeship, a condition in which it remained throughout the period in question.
3. The next event and the one relied on by the employer occurred on June 7, 1977 when the Board issued to the intervener a certificate covering the bargaining unit set out in the agreement between the employer and Local 721. That grant of certification had the effect of terminating – pursuant to section 48(1) of the Act – the bargaining rights of Local 721 along with the collective agreement.
4. The grievance which gave rise to this reference concerns the failure of the employer to remit in the period from April 25, 1977, the date the trusteeship was imposed, until June 7, 1977 – the date the collective agreement was terminated – the dues deducted by it, as the union alleges it was required by the terms of the collective agreement to do. The Board was informed that the dues were deducted from employees but that they were not remitted to the trustees. Apparently, it is the intention of the employer, should it prove successful in these proceedings, to pay the dues, which are being held in escrow, to the intervener.
5. Section 37(4) of The Labour Relations Act empowers the Minister to appoint an arbitrator or make such appointments as are necessary to constitute a board of arbitration under a collective agreement. It states:

Notwithstanding subsection 3, if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

6. In support of its contention that there has *not* been, in the instant case, a failure to constitute a board of arbitration under a collective agreement, counsel for the employer relies on the fact that the collective agreement between itself and Local 721 had been terminated before the grievance was filed. The position of the employer is that since there was no collective agreement in force between the parties at the time of filing – the grievance was not filed until September 27, 1977 – there is no basis upon which the grievance procedure can be invoked. Counsel cites a dictum of the board of arbitration in *Re United Steelworkers and International Nickel Co. of Canada Ltd.*, 22 L.A.C. 286 (Weatherill) as authority for this position.

7. The Board's role under section 96(1) is to determine whether the arbitration process is available to the parties. It is clear that in this case the events giving rise to the grievance arose during the term of the collective agreement between the employer and Local 721. The issue is whether the filing of the grievance, after the termination of that collective agreement, restricts the union's recourse to the arbitration procedure.

8. A fundamental policy of The Labour Relations Act is that all grievances arising during the term of a collective agreement are to be settled without stoppage of work. To ensure the achievement of that policy, the Legislature has mandated in section 37(1) a procedure for the peaceful resolution of all such differences. Section 37(1) requires that:

Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Here, the Board is dealing with a difference between the parties arising from a collective agreement even though the grievance was filed following the agreement's termination. That being the case, the Statute requires that the arbitration procedure provided for in the collective agreement be available to the parties. The Board does not consider that the legislative policy set out in section 37 was intended to be limited by reference to the time at which the grievance was filed. While the time of filing is a factor which may be taken into account by a board of arbitration – in deciding whether to arbitrate a grievance which is not filed within the time limits specified in the grievance procedure – it cannot preclude the establishment of an arbitration board to deal with a grievance arising during the term of a collective agreement.

9. This fundamental policy of compulsory arbitration of all contract grievances has been recognized by a number of arbitrators. See, for example, *Re International Chemical Workers, Local 564 and Cyanamid of Canada Ltd.*, 20 L.A.C. 111 (Palmer), where the board

of arbitration, relying on section 37(1) of the Act, assumed jurisdiction to deal with a grievance after the expiry of the collective agreement in question. Although the grievance in *Cyanamid* had been filed while the agreement was still in effect, that was clearly not the basis for the board's assumption of jurisdiction. In deciding that the grievance was arbitrable, the board in *Cyanamid* explicitly rejected the argument of the employer that its jurisdiction derived from the existence of a collective agreement. In conclusion, the board stated:

As it is quite possible to have rights determined by arbitration after the agreement which gave rise to those rights ceases to exist where the specific right involved crystallized before the expiry of that agreement ... this board is of the opinion that this matter is arbitrable.

See also *Re Truck Crane Ltd. and International Union of Operating Engineers, Local 793*, 4 L.A.C. (2d) 250 (O'Shea) where the board of arbitration decided that it had jurisdiction to deal with a grievance which had been filed after the expiry of the statutory freeze period but before the expiry of the time limits set out in the collective agreement. The board in *Truck Crane* stated:

The right to file a grievance for a breach of the collective agreement which takes place during the eleventh hour of the operation of the collective agreement is not extinguished until after the expiration of any mandatory time limits referred to in the grievance procedure of the collective agreement ...

See also *Hartz Mountain Pet Supplies Limited*, March 2, 1978 (Egan), as yet unreported, where the arbitrator assumed jurisdiction, albeit with the consent of the parties, to deal with a grievance in circumstances closely paralleling the circumstances here, and *The City of Kelowna and Canadian Union of Public Employees, Local 338*, November 12, 1975 (unreported), where the British Columbia Labour Relations Board, acting under the authority of section 96(1) of the British Columbia Labour Code (the section which allows it to inquire into collective agreement differences and make orders for their final and conclusive settlement) assumed, over the employer's objection, jurisdiction to deal with a grievance which had not been filed until after the agreement had expired. The Board's ruling was based on its finding that the rights of the union had "crystallized" before the agreement had expired. Although doubt has been expressed on the matter, the Board is unaware of any case in which a board of arbitration has refused jurisdiction to deal with a grievance simply because the collective agreement under which the grievance arose had expired before the date of filing. In *International Nickel*, the case referred to by counsel for the employer, an employee was attempting to bring a claim for entitlement under an existing collective agreement which related to a claim arising under an expired one. In deciding that the employee's claim was not arbitrable, the board quite properly concluded that the claim could only be raised (if at all) under the old agreement and that it could not be decided by a board of arbitration appointed under the new one.

10. Our conclusion is that the policy mandated by section 37 of the Act requires that all grievances which relate to events arising during the term of a collective agreement may be submitted to arbitration, even though the grievance is not filed until after the agreement has expired. In the Board's view, rights which accrue to a party during the life of a collective agreement are in the nature of vested rights which are not automatically extinguished by the

termination or expiry of the collective agreement under which they arose. To hold otherwise would be to, in effect, give both employers and unions a licence to violate the terms of collective agreements in the period immediately preceding their expiration.

11. The Board finds that there was a failure to constitute a board of arbitration under the agreement between the employer and Local 721 and that the Minister has authority under the Act to appoint a person to constitute a board of arbitration.

0405-78-M 370864 Ontario Limited, known as: **Katrina's Tavern** (Formerly Forge Tavern), (Employer), v. International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C., (Trade Union).

Successor Status – Employer turning tavern into a gay bar – Change in character of business insufficient to relieve employer of collective bargaining obligations.

BEFORE: G. Gail Brent, Vice-Chairman and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Michael Gordon and Roy LaRose for the employer; Beth Symes and Julius Troll for the trade union.*

DECISION OF THE BOARD: September 18, 1978.

1. By decision dated July 10, 1978 the Board decided that there was a collective agreement between the Trade Union and the Forge Tavern. The sole issue before us now is whether section 55 of the Act operates to bind the Employer or whether section 55(5) of the Act operates to deprive the Trade Union of its bargaining rights. This matter has come before the Board by way of section 96 and we have been asked to advise the Minister whether he may appoint a conciliation officer.

2. The Board is greatly indebted to the parties and their counsel for the way in which this matter was presented to the Board. The quality of the evidence and of the presentation was such that the Board was given every assistance possible in viewing this matter in its proper light.

3. On or about November 22, 1977 the Employer purchased assets belonging to 348539 Ontario Limited c.o.b. as The Forge and Bellows on St. Joseph Street in the City of Toronto. The most valuable of the assets acquired were undoubtedly the transfer of the leasehold interest in the property on St. Joseph Street and the transfer of the licence to serve alcoholic beverages. (The liquor licence was transferred on November 10, 1977.) There were various tangible assets purchased such as assorted office equipment, kitchen and bar equipment and sound equipment, and there were contracts assigned to the Employer for a copying machine, a neon sign (which was later removed by the Employer), and some bar equipment supplied by Liquid Carbonic Bar-boy Systems.

4. The evidence before the Board is quite clear that the Employer was not interested in acquiring the goodwill of The Forge and Bellows and the agreement of purchase and sale (Exhibit #11) discloses that no money was exchanged for the goodwill of The Forge and Bellows. The evidence is equally clear that the Employer, for reasons which will be discussed later, was neither proposing to open for business immediately upon the closing of the sale transaction nor to continue to employ the employees of The Forge and Bellows. In connection with the latter, on November 14, 1977 the solicitor acting for the Employer in the purchase wrote to the vendor's solicitors as follows:

"Further to our recent telephone conversations, we have since ascertained that the waitresses in the Forge and Bellows are unionized. Your client has advised me that a collective agreement was entered into in August of this year. Prior to closing of this transaction, would you kindly have your client attend to the dismissal of all employees.

In addition, I do not seem to have Schedule 'A', 'B', and 'C' to the Agreement of Purchase and Sale. Would you be so kind as to provide me with copies thereof."

5. The testimony of those witnesses familiar with The Forge and Bellows as it existed prior to November 22, 1977 has described rather bleak premises used for the sale of food and alcohol (mostly beer). The walls of the establishment were painted black – presumably to simulate the experience of being in a forge – and the evidence indicates that the quality of the food served was not particularly good. The Forge provided live entertainment which seemed to specialize in loud music. The clientele which patronized The Forge was young (mostly in the 18 to 25 age group), and varied. The evidence of Susan Ballantyne, who was employed there as a waitress, indicated that there were 6 sections in The Forge and the customers appeared to be fairly evenly divided into three groups described as being "rough" (mostly members of motorcycle gangs, "gay", and "young kids.") It would appear that relations between the groups were not always cordial and there is evidence that a fight of some considerable proportions broke out at The Forge on or about October 31, 1977.

6. The Forge employed approximately 7 waitresses and 2 bartenders in total. These people worked at different times during the day. The waitresses were responsible for taking food and drink orders and serving the customers. The bartenders dispensed and mixed drinks to order. The evidence does not indicate whether the waitresses and bartenders wore any particular uniform.

7. The Employer took over the premises and closed it down for repair and renovation. All of the witnesses who were familiar with The Forge agreed that substantial repairs were needed to various facilities – particularly the men's washroom and the kitchen.

8. The Employer described to the Board the plans for the operation which was subsequently opened for business on July 25, 1978. The Employer's evidence was to the effect that it sought to establish an "elite gay club" at the premises formerly occupied by The Forge. In the course of achieving this goal the Employer spent a considerable sum of money to create an interior and an atmosphere which it was hoped would attract a sophisticated homosexual clientele. The evidence given on behalf of both the Employer and the Trade

Union is not in dispute concerning the changes affected at the location and, without going into detail, the evidence indicated that the Employer has indeed created a silk purse from a sow's ear. There is also a dress code in force at the Employer's premises which prohibits jeans and cut-offs.

9. The evidence on behalf of the Employer concerning food service was, in summary, that the emphasis was on serving good food well. The Board was supplied with menus which showed that a noon hour buffet was served along with a reasonable selection of different types of food which was available all day, and a dinner menu for the main dining room. The type of alcoholic beverages served ranges from beer to wine to liquor.

10. The staff of the Employer, insofar as we are concerned, appears to consist of approximately 3 bartenders and around 5 waiters. The bartenders dispense and mix drinks to order. The waiters take food and drink orders and serve customers. The staff wear uniforms – safari jackets. The Employer's evidence was that, in order to create an atmosphere where gays could feel comfortable and welcome, a condition of employment was established that all staff coming in contact with the public should be gay.

11. During the day, music is played in Katrina's. This music is intended primarily as background and comes from a tape prepared by the Employer. At night disco-type music is played and there is dancing.

12. Insofar as one can tell, given the short time that the Employer has been operating Katrina's, the establishment is attracting an older (over 25) more sophisticated gay clientele than that which patronized The Forge, and none of the groups characterized earlier as "rough" and "young kinds" patronize Katrina's.

13. The Employer never intended to hire the employees of The Forge and it would appear that only one waitress formerly employed at The Forge came in to Katrina's to inquire about a job. There was disagreement between the waitress, Susan Ballantyne, and the Employer's manager concerning whether or not she was hired as a waitress. It would appear most likely that Ms. Ballantyne, who testified that she was not gay, was not definitely hired, but led to believe that she might have a job at Katrina's. Ms. Ballantyne was asked whether she was gay during her interview.

14. There was also evidence led that the Trade Union represents the employees of some gay bars in the City of Toronto and does not have a policy of discrimination on the basis of sexual orientation. Accordingly, Mr. Troll, for the Trade Union, testified that if he were asked to supply gay waiters or bartenders he would not do so, but "would send down a waiter and an employer would have to satisfy himself if the waiter was suitable."

15. The questions before the Board are whether there has been the sale of a business within the meaning of section 55 and if so, whether there has been a change in the character such that section 55(5) would apply to take away the bargaining rights of the Trade Union.

16. The evidence is clear that no goodwill was transferred to the Employer and that the intention of the Employer was to purchase assets which could be used in the business of operating a facility which would serve food and alcohol mainly to a particular segment of the gay population. The Employer apparently chose the premises in question because of the

location and because The Forge was in some financial difficulty. It would seem to be a reasonable conclusion that the goodwill of The Forge would be of no value (or even negative value) to the Employer in view of the Forge's clientele and its financial position.

17. The evidence is clear, though, that the liquor licence was transferred to the Employer before The Forge ceased operation, and that Katrina's is in the business of selling food and liquor to the public. The Forge also was in the business of serving food and liquor to the public. Although the Employer was not interested in operating as The Forge it was interested in operating a similarly-licensed outlet from the same premises.

18. The Board has in the past determined that the absence of goodwill in a transaction is not of itself determinative in deciding whether there has been the sale of a business within section 55 of the Act. (See, for example, *Winiker Industrial Auctions Ltd.* [1978] OLRB Rep. Jan. 15 and *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691.) The Board is interested in whether there has been a continuation of the business. Here there was a transfer of the liquor licence, a leasehold interest, various tangible assets, and interests in contracts virtually all of which could and would be used to carry on the business of the sale of food and drink. Therefore, it would seem that there was a continuation of the business in which The Forge was engaged and, unless section 55(5) operates, a sale of a business within the meaning of section 55. The fact that the business was closed for approximately eight months does not affect the conclusion in this case. The Employer here was closed to affect repairs and renovations and was prepared to open whenever these were completed. There was still a transfer of assets and most importantly, after this transfer the same sort of business continued to operate from the premises.

19. The Board must now decide whether this is a case where section 55(5) applies. There is conflicting jurisprudence on this point. On the one hand, in *Man of Aran Ltd.* [1973] OLRB Rep. 313, the Board examined the evidence and concluded, at page 314:

7. ... We find that the decor, the atmosphere, the customers and the employees of the applicant are different than these aspects of the business carried on under the name of Mintz's Tavern. The nature of the business was and remains a restaurant and tavern, and indeed, the present business operates under the same licences as did Mintz's Tavern. However, even though the nature of the business remains unchanged, the attributes of the business changed."

Later, at page 315 the Board, in deciding that section 55(5) applied said:

"11. We find on all the evidence in the instant case that while the nature or essence of the business carried on by the applicant is that of a restaurant and tavern, however, the character of the restaurant and tavern is that of an Irish pub. It is this character which readily distinguishes the applicant's business from Mintz's Tavern. Whatever the character of the restaurant and tavern business carried on under the name and style of Mintz's Tavern, it can clearly be said that Mintz's Tavern could not properly be characterized as an Irish pub.

20. Lastly, though, the Board's jurisprudence seems to be emphasizing the overall

purpose of section 55 when interpreting section 55(5). The purpose of section 55 is "to provide permanence to established bargaining rights" (*Winiker Industrial Auctioneers Ltd.* (supra)). In *Jimmy's II*, [1977] OLRB Rep. Sept. 572 the Board cited with approval *Winco-Steak'n Burger*, [1974] OLRB Rep. Nov. 788 and *Marvel Jewellery Limited*, [1975] OLRB Rep. Sept. 733, and said at page 575:

"12. ... The Board's approach to the construction of section 55(5) has undergone some development as the labour relations implications of the section have become apparent. Initially the Board took a rather broad view of the scope of section 55(5). In *Man of Aran Ltd.* ... the first case of significance decided under section 55(5), the Board focused on the dictionary definition of the word 'character' to reach the conclusion that a conversion from a general tavern to an Irish pub constituted a change sufficient to warrant section 55(5) relief. There then occurred a movement toward a less expansive interpretation of the section and more in keeping with the purpose of section 55 as a whole. ... In *Winco* the Board has this to say about the kind of situation for which section 55(5) was designed:

'... ... Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words 'substantially different' must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review.' "

21. The Board agrees with the reasoning adopted in *Jimmy's II* (supra) and therefore must consider whether continued representation by this Trade Union "would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case." The work performed by the Employer's waiters and bartenders is substantially the same as the work performed by the waiters and bartenders employed by the Forge. The only real difference is not in the sort of work performed, but rather in the Employer's standards of how that work ought to be performed. Accepting as a fact that the Employer does demand a high quality of customer service from its employees, that does not change the sort of work performed by the waiters and bartenders.

22. The Employer has a policy of requiring all of its staff coming into contact with the public to be gay. The Trade Union does not discriminate on the basis of sexual orientation. There may well be problems which arise if the Trade Union, which represents both homosexuals and heterosexuals, continued to send over waiters or waitresses, for example, who were rejected by the Employer for not being gay. Whatever the legal implications or public policy which pertains to this sort of discrimination in hiring, the Board does not find that sexual orientation affects "the nature of the work requirements and skills involved" of waiters, bartenders and others within the scope of the collective agreement herein.

23. The Board is not without sympathy to the wishes of the Employer to create a high

quality establishment out of a rather shabby undertaking. The Board must conclude, though, that the Employer effected a change in character to the extent that the clientele of the establishment he purchased changed, but did not affect a change in character "so that it is substantially different from the business of the predecessor employer" within the meaning of section 55(5).

24. The Board is aware of the fact that the Trade Union has been lax in meeting the filing requirements of the Act, and accepts that the Employer's solicitor failed to discover a copy of the collective agreement between the Trade Union and the predecessor employer when he caused a search to be made. It would appear, though, that on or before November 14th the Employer's solicitor was aware of the Trade Union's bargaining rights (see Exhibit # 12 reproduced above) and, even though nothing turns on it, we would point out that there appeared to be prior knowledge of the bargaining rights despite the Trade Union's apparent failure to meet its statutory obligations.

25. Accordingly, for all of the reasons stated above, the Board will advise the Minister that there has been a sale of a business within section 55 of the Act and that the Minister has the authority to appoint a conciliation officer. If any decision is to be made as to whether the Trade Union should represent the employees of the Employer, it is a decision which now properly belongs to the employees concerned.

0133-78-U Service Employees Union, Local 183, (Complainant), v. Lennox and Addington County General Hospital, (Respondent).

S-79 – Change in working conditions – Alleged breach of statutory freeze of employment conditions – Failure to pay annual wage increase in accordance with long established policy – Refusal motivated by certification – Departure from usual policy held to be a breach of statutory freeze.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members F. W. Murray and D. B. Archer.

APPEARANCES: *C. M. Mitchell and Robert Blewett for the complainant; P. A. S. Milliken for the respondent.*

DECISION OF THE BOARD: September 6, 1978.

1. This is a complaint under section 79 of The Labour Relations Act in which the complainant alleges that the respondent has violated sections 70(1) and (2) of The Labour Relations Act and section 10 of *The Hospital Labour Disputes Arbitration Act*, in that the respondent has failed to make the appropriate annual wage increases for employees in the bargaining unit.

2. Sections 70(1) and (2) provide:

(1) Where notice has been given under section 13 or section 45 and no col-

lective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees.

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until.

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

3. Section 10 of *The Hospital Labour Disputes Arbitration Act* provides as follows:

Notwithstanding subsection 1 of section 70 of *The Labour Relations Act*, where notice has been given under section 13 or 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

4. The complainant applied for certification as bargaining agent for all employees of the respondent, with certain exceptions not here relevant, on September 21, 1977. An interim certificate was issued by the Board. The formal certificate was issued on January 12, 1978. Notice to bargain, pursuant to section 13 of The Labour Relations Act, was given on November 1, 1977 and the parties have met and bargained.

5. Mr. Ernest Mills, who is the administrator for the hospital, testified that for the past nine years annual increases had been given in January of each year. He said that although the amounts varied, this had been a continual policy during those years and that during the last three years, the employees had been given the Anti-Inflation Board maximum.

6. The evidence is that no pay increase was given to the employees in the bargaining unit for the year commencing January 1, 1978, although a 4% increase was approved by the Hospital Board and paid to persons not covered by the certificate. Mr. Mills said that he had made no recommendations with respect to the bargaining unit and that the Hospital Board had not approved 4% for the bargaining unit people. He said that it had been spoken about but it was decided that the employees had made a choice and the matter was going to arbitration. The evidence further establishes that Mr. Mills had raised the argument that wages for the bargaining unit employees were frozen under section 70 of The Labour Relations Act by reason of the certification application. He did this both orally and in a letter dated February 17, 1978. He also said in evidence that had a recommendation been made, it would have been for a 4% increase.

7. It was the contention of the respondent that there was no contractual obligation to pay an annual increase and that such an increase was not guaranteed but came purely *ex gratia* from the employer. It was argued that while it may have been a policy to give an annual increase, "policy" was not a matter falling within the ambit of sections 70 and 10 of the respective Acts.

8. We are unable to accept the contention of the respondent. While it is true that no promise of payment for 1978 was made to the employees concerned, the evidence is uncontradicted; indeed, it is that of the respondent, as already noted, that an annual increase had been given each year for the nine years preceding 1978. There can be no doubt that this policy which has been thus sustained over such a length of time established in the employees concerned a reasonable expectation of its continuation in 1978, and is thus a matter falling within the scope of sections 70 and 10 of the respective Acts (see *Kiddies Toys Manufacturing Co. Ltd.*, 65 CLLC ¶ 14,040). In the present case it is clear that no indication of any intent to deny the customary increase had been communicated to the employees concerned prior to the commencement of the freeze period (*Carleton University*, [1978] OLRB Rep. Feb. 184).

9. The evidence of Mr. Mills is that the employees in the bargaining unit would have received the annual increase that was given, in accordance with past practice, to the other employees, had it not been for the application for certification and the respondent's understanding that the increase was prohibited under sections 70 and 10 referred to above.

10. Clearly, in the normal course of events, the respondent would have given the 4% increase to the employees in the bargaining unit in accordance with its long-standing policy

as it did to the employees outside the bargaining unit. In deciding to alter the practice with respect to the employees in the bargaining unit, the respondent breached the provisions of section 70 of The Labour Relations Act as modified by section 10 of *The Hospital Labour Disputes Arbitration Act*.

11. The Board accordingly directs the respondent to forthwith pay to the employees in the bargaining unit the 4% increase on their wages earned from and including January 1, 1978. The Board remains seized of the matter so that it may deal with any dispute that may arise with respect to the payments.

0176-78-JD Mac J. Brian Mechanical Ltd., (Complainant), v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Donald Stewart and James Phair, (Respondents).

Jurisdictional Dispute – Practice and Procedure – Union requesting reconsideration of interim order and opportunity to adduce evidence – Allegation that Board was misled improperly proceeded in absence of affected company – Company not named in original pleadings – Interim order intended only to preserve status quo – Board refusing to delay for purposes of hearing evidence on merits at this stage of proceeding.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and F. W. Murray.

DECISION OF THE BOARD: September 26, 1978.

1. In a decision dated May 1, 1978, the Board made an interim order with respect to the assignment of certain work.
2. Ranta Enterprises (Amherstburg) Limited ("Ranta") has objected to the disregard shown to its contract with the complainant. Ranta has alleged that on April 18, 1978, its field superintendent was informed by the complainant's employees that the work which forms the subject matter of this dispute was to be re-assigned to members of Local 552 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Local 552"). Ranta also alleges that on April 27, 1978, it was advised by the complainant that its contract with respect to the work which forms the subject matter of this complaint was cancelled. Ranta has objected to the Board that without Ranta having been heard or consulted a practice for at least fifteen years involving millions of dollars per year has been arbitrarily changed by the Board. Ranta has also stated that "at all times the unloading and hoisting or moving to approximate point of installation was and is being done by [Ranta's] employees (Operating Engineers, Local 793 and Iron Workers, Local 700) on all projects in this area". Ranta has asked that the interim award be set aside until Ranta has been permitted to make representations.

3. The International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 ("Local 700") has requested that the Board reconsider its decision with respect to the interim order. The request of Local 700 is based upon two reasons. Firstly, that the letter from Ranta indicates that the original crew on the site was composed of ironworkers and operating engineers and that this is in direct contradiction to the statement made on behalf of Local 552 at the hearing that the initial crew at the site was composed of plumbers or a mixed crew of plumbers and ironworkers. Local 700 also states that it appeared from Ranta's letter that Ranta was not told at the time it was awarded the contract that the job would be performed by plumbers and that this again is in contradiction to the statement made to the Board at the hearing. Secondly, that the misrepresentations made to the Board were particularly serious since they were made on crucial matters in an application where no formal evidence was heard and where Ranta was not present to refute the statements since it had no notice of the hearing.

4. The complainant in a letter has taken issue with the position of Ranta and Local 700. In particular, the complainant takes issue with Ranta's characterization of Ranta's claim that the value of work with the complainant amounted to "millions of dollars" in any given year. The complainant has emphasized that it has not and will not cease to award contracts to Ranta for those items of equipment to which the ironworkers have jurisdiction. The complainant submitted that the facts were clearly disclosed in their entirety to the Board at the time of the original consultation. The complainant observed that Local 700 was present together with its business agent and were represented by the same solicitors who have requested reconsideration. The complainant submitted that reconsideration was not in order.

5. In a letter to the Board Local 552 stated that all of the pertinent facts were before the Board during the consultation and alleged that the contents of the letter from Ranta were misleading and in certain pertinent areas contained substantial errors. The letter then proceeded to set out the facts as perceived by Local 552. The letter closes by pointing out that none of the work in dispute was presently being performed or in prospect on the project. Local 552 stated that reconsideration of the interim order would not seem to be appropriate.

6. The Board notes that no one has contested the allegation that none of the work in dispute was presently being performed. Before the Board issues an interim order it must be satisfied that it has jurisdiction under section 81(8) of The Labour Relations Act. Before the Board issues an interim order it consults with the parties who, in its opinion, are concerned with the request for an interim order. The Board does not hear evidence. The Board hears evidence and representations from all interested parties in connection with the request of a complainant that a cease and desist direction be granted by the Board. The Board hears evidence and representations from all interested parties in connection with a request that the Board issue a direction under section 81 of the Act.

7. The purpose of an interim order is for the Board to forthwith make a determination where it has jurisdiction. The effect of an interim order by the Board is generally to preserve the *status quo*. In making such a determination, the Board draws upon its experience in the jurisdictional claims of trade unions. The persons who have requested a reconsideration of the Board's interim order seek to adduce evidence with respect to matters other than the jurisdiction of the Board to entertain the request for an interim order. Such persons seek

to adduce evidence and make representations on matters which are more appropriate during a hearing on the merits in a request for a direction. Under ideal circumstances the Board hears a request for a direction shortly after it hears a request for an interim order.

8. In the Board's view, Local 700 misconceives the purpose and nature of an interim order. Such an order is not a determination on the merits, it is merely interim in nature. If the Board were to proceed along the path advocated by Local 700 and Ranta, the Board would be unable to issue interim orders and would be immediately confronted with a hearing on the merits. The value of an interim order lies in the fact that it is available in an expeditious proceeding where a strike is imminent or is taking place.

9. The Board's notes of the hearing indicate that the solicitor for Local 700 and Mr. Donald Stewart and not the solicitor for Local 552 informed the Board that the original assignment was to a mixed crew of six ironworkers and five members of Local 552. If anyone has misled the Board it is not the solicitor for Local 552. The reference to Ranta of operating engineering and ironworkers in connection with the "unloading and hoisting, or moving" is perfectly understandable. The interim order refers only to "unloading and handling". It appears to the Board that the operating engineers would enter into consideration only with respect to "hoisting or moving". The Board finds that no serious misrepresentations were made to it by any person. The participation of the operating engineers is immaterial to the granting of the interim order. Even if Ranta had been present at the consultation, the Board would have reached the same conclusion.

10. Ranta is complaining about not being heard. Ranta was not named as an interested person in the complaint. However, as the Board has pointed out above, with respect to the interim order a consultation which included Ranta would not have caused the Board to make a different decision. The other matters which Ranta has raised arise out of contractual obligations. Ranta may have relief in a forum other than the Board in connection with such obligations.

11. The Board has considered the representations of the parties including the letter from Donald Stewart. For the reasons set forth previously, the Board affirms its decision in this matter dated May 1, 1978. In conclusion the Board notes that a meeting will be held for the purpose of expediting a determination of this complaint on the merits. At such time Ranta will have an opportunity to call evidence and make representations.

0591-78-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), (Applicant), v. **Peerless Plastics Limited**, (Respondent).

Successor Status – Company union restricting membership to company employees amending constitution and subsequently merging with UAW – Adequate notice of meetings – UAW declared successor – Failure to immediately transfer assets no impediment to merger.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members F. W. Murray and A. Hershkovitz.

DECISION OF THE BOARD: September 6, 1978.

1. This is an application for a declaration of successor status pursuant to section 54 of The Labour Relations Act.

2. The Plastic Workers of Windsor, Unit I, was certified on November 14, 1975 and there is currently a collective agreement between it and Peerless Plastics Limited (Windsor) expiring in 1979.

3. In March 1978 the Plastic Workers of Windsor, Unit I, held an election of officers resulting in a new slate and Mrs. Susan Court was elected President. Mrs. Court testified that there had been previously some general interest amongst employees in the UAW and as a result of renewed expressions of interest following her election, she made contact with Mr. Ken Simpson, an International Representative for the UAW. This led to Court organizing a meeting of employees who had previously expressed interest in the UAW at which there were 26 employee-members of the Plastic Workers Union and including 4 members of the Executive Board and at which Simpson attended.

4. Following a period of discussion a prepared form of petition was produced by Simpson and signed by all 22 members of the Plastic Workers Union present, (the 4 Executive Board members refraining) petitioning and requiring that the Executive Board call a special or general meeting of the union for the purpose of presenting an amendment to the Constitution to permit a merger and a resolution that the Plastic Workers merge with UAW, both of which documents were annexed to the petition. Immediately following this meeting the Executive Board held a meeting and made the decision to proceed to call a membership meeting in accordance with Articles 23, 24 & 36 of the union Constitution. These events all transpired on May 27, 1978 and a membership meeting was scheduled for June 17, 1978 (the Constitution requiring that the Secretary be notified 3 weeks in advance of a meeting).

5. On June 10, 1978 notices of the June 17, 1978 meeting was mailed to all members (consisting of 44) by Mrs. Court: no letters have been returned as undelivered and no complaints were received either about non-receipt of notice or about adequacy of notice (except in respect to one, Meunier, as will appear later). This notice sets out the purpose of the meeting and the text of an amendment to the Constitution and the text of a resolution which would be placed before the meeting.

6. The meeting of June 17th was duly held and 35 members were in attendance. At this meeting the Constitution was amended as follows:

“The Plastic Workers of Windsor Unit I may merge, amalgamate with,

and/or transfer its jurisdiction to any other trade union by a majority vote of those members present and voting at a special meeting called for that purpose, and will thereby dissolve its separate existence.”

A secret ballot vote was conducted (one scrutineer from each of three shifts appointed) on this question, resulting in 30 Yes votes and 5 No votes.

A further secret ballot was conducted on the issue of merger with the UAW in the following terms:

“Resolved that the Plastic Workers of Windsor Unit I merge and amalgamate with and transfer its jurisdiction to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and thereby dissolve its separate existence.”

and the result was 30 ballots in favour, 4 opposed and 1 spoiled.

7. In response to a notification to the UAW of the action, taken by the membership, a letter dated June 23, 1978 was received from Robert White, Canadian Director of the UAW stating,

“Congratulations on the decision made by the executive and members of Plastic Workers of Windsor Unit #1 to merge with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.).

The U.A.W. welcomes you and will be making an application for Successor Rights to the Ontario Labour Relations Board on Monday, June 26, 1978. You will be part of Amalgamated Local 195 located in the city of Windsor.

Best Wishes.”

8. Mrs. Court testified that a bank account and other assets of the Plastic Workers of Windsor have not been transferred to the UAW (nor was disposal of assets discussed at the June 17th meeting) and that there has been informal discussions with the UAW in this regard and the UAW has stated themselves not to be interested in such assets and that the local group should dispose of them as they wish.

9. Notice of these proceedings, as is normal practice, was posted in the plant of Peerless Plastics and no employees have intervened in the proceedings. The employer called as a witness, Mr. Paul Meunier, who was involved in the formation of the Plastic Workers of Windsor, Unit I and who was Vice-President of that organization at its formation. Mr. Meunier works in the maintenance department and his name appears on the seniority list with the job title, “Foreman” although he describes himself as a “maintenance man”; in any event he is clearly included in the bargaining unit.

10. Meunier testified that in the formation of the Plastic Workers Union he had played a leading role and that the question of restricting membership to employees only of

the Peerless Plastics was a deliberate decision based on the opinion that an organization strictly for that plant would be of more benefit to the employees than being part of a larger unit. He states that when the original Constitution was debated and accepted that this question was discussed at the constitutional meeting. Meunier testified that he is in opposition to a merger with UAW because it defeats a major purpose for which Plastic Workers Union was set up.

11. Meunier further testified that he received notice of the June 17th meeting on June 14th and complained to Mrs. Court on June 15th about the adequacy of such notice. Court testified that Meunier did complain to her on June 14th that he had received the notice on June 13th. Court fixes the time by virtue of the fact that since mailing the notices on Saturday, June 10th, she was naturally awaiting reactions from members on receipt of notice; that no one mentioned anything on Monday, June 12th; that the afternoon shift foreman approached her on June 13th saying he had received a notice and that it was the next morning June 14th at 8:05 a.m. that Meunier approached her. Court also testified that it was on Tuesday, June 12th that she herself received her own mailed notice of the meeting. We must prefer the evidence of Court over that of Meunier in respect to this item. Meunier did in fact attend the meeting of June 17th despite the fact that it was the same day on which his son was being married.

12. Court also testified that she knew from the posted vacation schedule (posted after the decision taken to hold June 17th meeting) that 3 members would be on vacation at the time of the meeting. Court spoke to one of these persons (who was one who had signed the May 27th petition) who stated she would have voted in favour of merger and dissolution. Court stated her reason for not speaking to the other two was that they were foremen and she avoided them for the same reason as not inviting them to the informal meeting of May 27th, namely, that she was apprehensive that such contact would have resulted in information about the planned meeting being passed on to the Company. Court also states that it was for the same reason that notice of the meeting was not posted in the plant, although such postings had been usual up to that time.

13. Counsel for the employer argues that the *Zayre* case [1977] OLRB Rep. Oct. p. 637 and the *Narco Food* [1971] OLRB Rep. June 326, are distinguishable from the case now before us in that in this case the evidence clearly establishes that membership in the organization was expressly confined to the employees of a single employer and that to change this aspect of the organization by merging with an organization whose membership is open to employees of multiple employers and to persons employed in a diversity of types of industry is to effect such a fundamental change in the organization as to require unanimity amongst the members in order to effect. For this argument counsel cites the decision of the Ontario Court of Appeal in *Astgen et al. v. Smith and Int'l Mine, Mill & Smelter Workers* 69 CLLC ¶ 14198.

14. We do not read *Astgen v. Smith* as standing for the proposition put forward. In that case, the Executive Board of the Mine, Mill purported to act, following a membership referendum under the general power provided in its Constitution to amend that Constitution and the Court found that, in the absence of a specific constitutional provision providing for a change in fundamental objects of the organization (which the Court found a merger and dissolution to be) such action could not be accomplished through the general amendatory provisions in the Constitution but would require unanimity of decision. As the Court said at para. 14198.

“There is ample authority for the proposition that the authority of the majority to amend the Constitution could not accomplish a change in the fundamental objects of the Association.”

It is clear to us that the Court was there dealing with a situation where the Constitution provided a general power of amendment only and provided no specific procedures for effecting a fundamental change. This becomes quite clear from the words of the Court immediately preceding the above quotation and wherein the Court said,

“In the present case, where the Executive Board has, by its vote, sought to make a change affecting a fundamental right of each member, *I consider that such a basic alteration in the individual contract of membership or in a termination of those contracts requires that the authority for so doing be in the language of the Constitution which is specific and unequivocal.*”

(emphasis added)

In the present case the Constitution was amended to include “specific and unequivocal” language in providing authority for a decision to merge or dissolve, and it is under that authority that the organization has acted.

15. Nor do we find any merit to the argument that this authority to merge must, to be effective, have been included in the Constitution at the time an individual joined the organization in order to be binding on him. It is clear that the rights and obligations of members *inter se* as governed by the Constitution must be capable of change to meet changing desires; were it otherwise, you would end up with a multiplicity of varying contracts between members dependent solely on the state of the Constitution at the moment of their joining.

16. Counsel for the employer also argues that the merger was defective in that proper notice was not given to members of the June 17th meeting. It is argued that Article XIV of the constitution dealing with the duties of the office of Secretary provides, *inter alia*, that,

“He shall see that all members are notified ten days in advance of any annual or other membership meeting of the trade union.”

and, as a matter of interpretation should take precedence over Article 23 dealing with “Annual and Other Meetings of Members” and which provides,

“... Notice of the time and place of every such meeting shall be given to each member by sending the notice by prepaid mail or delivering same by hand, ... three days before the time fixed for the holding of any other general or special meeting.”

It is also argued that, in any event, the three days notice required by Article 23 does not, in the circumstances, meet the common law requirement of “reasonable notice”.

17. We are of the opinion that the notice requirements of Article 23 of the Constitution have been met: the notices mailed on June 10th would have been received in the ordi-

nary course of mail (and the evidence is that they were in fact received) on June 13th and that is three days prior to the meeting of June 17th. The apparent conflict between language in Article 14 relating to the Secretary's duties and Article 23 which is governing in respect to holding and calling of meetings must be resolved by treating Article 23 as the overriding section.

18. Was the Constitutional requirement of three days notice reasonable notice having regard to the subject matter to be dealt with? We note at the outset that the meeting was called for a non-working day on which all members would be available and that the site of the meeting was the community in which all members live and it is our finding that the notice was such that members were given a reasonable opportunity to attend. The fact that some members would, because of personal circumstances, be unavailable is inherently inevitable in the calling of any meeting and in the absence of the date being fixed deliberately to preclude certain members attendance (of which there is no suggestion here) cannot invalidate the meeting called.

19. It was also argued that all other membership meetings had been called by posting notices in the plant and that this would have provided a more adequate notice. We have already found that the notice was in accord with the Constitution (which posting in the plant is not) and did provide a reasonable opportunity to members to attend and that finding disposes of this argument. In our opinion there were *bona fide* reasons for not posting in the plant.

20. Finally, the employer argues that the merger is incomplete because there has not been a transfer of assets to the UAW and we are referred to the case of *The Board of Education for the Borough of North York* [1970] OLRB Feb. 1376. Our reading of that case is that it is authority for the proposition that where a merger is subject to conditions precedent which have not yet been fulfilled (in that case the establishment of a separate local) and the merger therefore obviously not completed, there can be no declaration that the rights, privileges and duties of the predecessor union have been acquired by the successor union. The transfer of funds and property in that case were inextricably bound up in the creation of a chartered local and the assurance of their retention in the local was a major factor in the decision to merge. In the case before us, there is no evidence that there were any conditions precedent to the merger yet to be fulfilled, the retention of control over assets was not an issue and indeed the successor union has in effect given the members of the predecessor union a quit claim to any property rights it might have otherwise asserted.

21. We find that by virtue of the steps taken by the Executive Board, as well as the members of the Plastic Workers of Windsor, Unit I, has effectively dissolved and has merged and amalgamated with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and transferred its jurisdiction thereto, which merger, amalgamation and transfer of jurisdiction was completed by virtue of White's letter of June 23, 1978.

22. Counsel for the applicant raised, in argument, the propriety of the respondent employer adducing evidence as to the issues above cited in the absence of any intervention in these proceedings by individual members of the Plastic Workers Union. We are referred to the line of cases represented by *Cunningham Drug Stores* 72 CLLC [14147] and *Transair* 76 CLLC [14024] and counsel argues that a section 54 application is, in the main, analogous

to other proceedings before the Board in which the governing factor is the true wishes of the employees and in respect to which the employer is expected to maintain an attitude of "non-interference". We do not feel that the cases cited are "four-square" with the present case inasmuch as they dealt with a claim of denial of natural justice to persons not before the relevant Board and which claim was being asserted by the employer on behalf of absent and non-intervening employees. Additionally, while the wishes of employees are of paramount importance in a section 54 application, the Act and the law requires certain standards to be met not only, in the expression of such wishes but together with other executory acts in order that they shall be effective. In any event, we find it unnecessary to deal with the applicant's argument in view of the conclusion which we have already reached.

0731-78-U Alliance Employees' Union, (Complainant), v. Public Service Alliance of Canada, (Respondent).

S-79 – Change in Working Conditions – Employer having established practice of adjusting working conditions of its own employees to match those of federal public servants – Employer required to continue pattern of automatic revisions.

BEFORE: Donald D. Carter, Chairman, and Board Members M. J. Fenwick and H. W. Gibson.

APPEARANCES: *Thomas Dinan and Ron Cochrane for the complainant; William E. McCaughey and M. O. Jones for the respondent.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER M. J. FENWICK; September 8, 1978.

1. This is a complaint under section 79 of the *Labour Relations Act* alleging a violation of the statutory freeze imposed by section 70 of the Act. The focus of this complaint is the failure of the respondent to adjust the salary scales of those persons falling within the complainant's bargaining unit so as to maintain parity with corresponding classifications in the Public Service of Canada.

2. The complainant applied for certification in mid-February of this year, and notice of this application was received by the respondent on February 16, 1978. A certificate was issued to the complainant, on May 8, 1978, for a bargaining unit of "all employees of Public Service Alliance of Canada employed in an administrative capacity in Ottawa, save and except elected and appointed officials of Public Service Alliance of Canada, employees of Public Service Alliance covered under a subsisting collective agreement with The Canadian Union of Labour Employees, employees of Public Service Alliance of Canada covered by a subsisting collective agreement with Ottawa Typographical Union, Local 102, and employees of Public Service Alliance of Canada employed in an administrative support capacity". The complainant served the respondent with notice to bargain on May 16, 1978.

3. Two negotiating meetings have been held since that time – one on May 20, 1978,

and the other on July 6, 1978. Meanwhile, on May 24, 1978, an arbitration award was rendered, granting certain increases for persons falling within the Information Services Group in the Administrative and Foreign Service Category of the Federal Public Service. On June 14, 1978, a Bulletin of Treasury Board announced certain increases for the PE group of public servants, a group excluded from collective bargaining under the *Public Service Staff Relations Act*. It was agreed that employees falling within the complainant's bargaining unit held classifications comparable to those existing in the federal public service for these two groups. At the negotiating meetings the complainant asked whether the respondent would be adjusting the terms and conditions of employment of the members of the bargaining unit to maintain parity with those of comparable federal public servants, as had occurred in the past. In a letter prepared immediately after the July 6th meeting, the respondent stated its position that there would be no such revision of salaries. The text of the letter reads as follows:

This letter will serve to confirm in writing the employer's position that it does not intend to revise salaries of Alliance Centre employees represented by the Alliance Employees' Union as a consequence of salaries revised by Treasury Board for employees of the Public Service classified in similar or like classifications.

It is the employer's position that with the issue of a certification Order by the Ontario Labour Relations Board dated May 8, 1978, and with notice to bargain having been served on the employer on May 16, 1978, by your Union, that the salaries of employees in the bargaining unit is a proper matter for negotiation to be resolved at the bargaining table.

4. The evidence revealed a clear practice over the years of the respondent automatically revising the terms and conditions of employment of its own employees to make them comparable with those received by its public servant members. In 1976, however, the Executive Management Committee of the respondent was faced with the problem of whether their policy should apply to those situations where its own employees organized themselves for collective bargaining. Apparently, at that time, a decision was reached by the Executive Management Committee that employees who unionized would receive different treatment. It should be noted that about the same time the respondent had granted voluntary recognition to the Canadian Union of Labour Employees (CULE) to act as a bargaining agent for all employees of the Alliance Centre. On January 6, 1977, the respondent requested its branch directors to post a memorandum to the Staff of the Alliance Centre. This memorandum reads as follows:

On October 19th, 1976, in response to a request made by the Canadian Union of Labour Employees, the Executive Management Committee, having verified the Union's claim to represent a majority of employees of the Alliance Centre, granted voluntary recognition to that Union to act as bargaining agent for all employees of the Alliance Centre other than certain persons excluded by mutual agreement from the bargaining unit and other employees already represented by the Ottawa Typographical Union.

In consequence, the Alliance Centre, as employer, entered into a collective bargaining relationship with CULE, as bargaining agent and introduced a new phase in Alliance Centre employer-employee relations heretofore governed by terms and conditions of employment established in the Personnel Manual. Employer-employee relations in respect of those employees included in CULE bargaining units will, in future, be governed by collective agreement. It is expected that CULE will, in the near future, serve demands on your employer seeking modification to certain terms and conditions of employment including that of pay.

The Executive Management Committee has asked that I inform all employees included in the CULE bargaining units that, with effect from the date of voluntary recognition (October 19th, 1976), economic pay increases obtained by public service employees in corresponding classifications will no longer be automatically granted to employees included in the CULE bargaining units. Under the new relationship, pay is a subject for negotiation. The Executive Management Committee has, however, authorized the continued payment of semi-annual and annual pay increments where an entitlement exists.

5. It would appear that roughly two-thirds of the membership of the complainant's bargaining unit had been members of the CULE bargaining unit at the time this notice was posted. Subsequently, however, these employees had withdrawn from this voluntarily recognized unit and had organized themselves into the bargaining unit certified by this Board. There was also evidence at the hearing that at least some of these employees could not recall ever having seen this memorandum.

6. The constitution of the Public Service Alliance of Canada was also put in evidence. Section 17 of that document provides:

TERMS AND CONDITIONS OF EMPLOYMENT

Sub-Section (1)

Terms and conditions of employment, other than salaries, for full-time officers and staff shall be similar to terms and conditions of employment in the Public Service of Canada.

Sub-Section (2)

The salaries of full-time elected officers of the Executive Management Committee shall be established by the National Convention.

Sub-Section (3)

The salaries of appointed staff shall be established by the Executive Management Committee within the limitations imposed by the National Convention or by the National Board of Directors.

Sub-Section (4)

Salaries of elected officers, appointed officers and staff shall be based on Public Service classifications.

Sub-Section (5)

Notwithstanding the provisions of Sub-Sections (2), (3) and (4) when Public Service salaries are revised in classifications similar to positions occupied by full-time elected officers, appointed officers and staff of the Alliance Centre, such revision shall apply coincidentally to such full-time elected officers, appointed officers and staff.

Sub-Section (6)

Notwithstanding Sub-Sections (1), (3), (4) and (5) of this Section, the terms of any negotiated agreement with the staff or parts thereof shall serve to amend and shall take precedence.

7. Section 70(1) of the *Labour Relations Act* prohibits, except with the consent of the trade union, the alteration of “the rates of wages or any other term or condition of employment or any rights, privileges or duty, of the employer, the trade union or the employees” for a period from the giving of notice to bargain until the parties are in a position to lawfully strike or lock-out, or until representation rights have been terminated. The Board in previous decisions has interpreted this prohibition as requiring that the totality of the employment relationship of those employees entering collective bargaining be maintained in the pattern existing prior to the imposition of the statutory freeze. The parties in this case, however, differed as to the exact nature of this prior pattern. The complainant argued that there existed a clear policy of adjusting the working conditions of all employees to a level comparable with their public servant counterparts. On the other hand, the respondent argued this policy of comparability was never intended to apply to those employees who organized, pointing to sub-section (6) of section 17 of the constitution and to the memorandum of January 6, 1977.

8. The matter before us is simply one of determining the pattern that the employment relationship of the members of the complainant’s bargaining unit had assumed prior to the imposition of the freeze. No argument was made that a policy, such as that announced in the January 6th memorandum, might by itself be a violation of the Act. There is no doubt that the respondent had established a firm practice of adjusting the working conditions of its own employees to match those of federal public servants. This practice had been clearly set out in sub-section (5) of section 17 of the constitution, and had been in force since the inception of the Alliance. Given this degree of entrenchment, in the Board’s view, a change in such a policy can only be carried out by clear and unambiguous notice to the employees benefitting from it.

9. Certainly, sub-section (6) of section 17 of the constitution falls far short of such notice. It is not the function of this Board to give a final and binding interpretation of the respondent’s constitution, and we do not intend to do so. Nevertheless, it cannot be said that sub-section (6) clearly enunciates a policy that wage revisions will not accrue to the

benefit of those Alliance employees who, having organized themselves for collective bargaining, are in the process of negotiating a collective agreement. It is equally open for this provision to be interpreted as merely providing that the wage revision system would be supplanted only after a collective agreement had been reached by the respondent and its employees. This constitutional provision, therefore, cannot be regarded as clear notice that a different policy of wage revisions would apply to employees who are in the process of negotiating a collective agreement.

10. The memorandum of January 6th suffers from the same defect. While there is no doubt that it enunciates a clear policy, this policy appears to be directed only at a particular situation. Even given the fact that many employees falling within the complainant's bargaining unit were in the CULE bargaining unit at that time, the Board does not consider that this document can be considered as adequate notice of a general change in the long-standing practice of automatic revisions. Employees reading this memorandum could only interpret it as enunciating a policy in respect of members of the CULE bargaining unit, and not in respect of employees who at some future time might decide to organize.

11. The Board's conclusion is that there existed an established pattern of automatic revisions at the time of the imposition of the freeze. The respondent's refusal to implement such revisions in respect of the members of the complainant's bargaining unit, therefore, constituted a violation of section 70(1) of the Act. The respondent is directed to implement these wage revisions according to its established practice. The Board remains seized of this matter to deal with any disagreement between the parties that might arise out of the implementation of this direction.

DECISION OF BOARD MEMBER W. H. GIBSON:

1. I would have found, for the following reasons, that the memorandum of January 6, 1977 was adequate notice to the staff of the Alliance Centre that the bargaining relationship was different for organized groups in that they now have a union to bargain for them, and therefore would not automatically receive the same increases as Public Service employees in similar classifications.

- i) The memorandum is clearly addressed to the staff of Alliance Centre (not just those represented by C.U.L.E.). I do not think it is crucial that the body of the memo refers only to the C.U.L.E. situation as that was the only union that was currently in the picture on an organizing drive at that time.
- ii) The branch directors were instructed to post a copy of this memorandum on each floor of the Alliance Centre.
- iii) Nowhere in the evidence did it come out that the Public Service Alliance of Canada intended different treatment for different unions – but there was an indication of a simple and understandable policy that the unorganized would receive the automatic Public Service increases, and the organized could leave it to their union to bargain for them.

- iv) A copy of the memorandum went to C.U.L.E., and the same Mr. T. Dinan who appeared before the Board as president of the Alliance Employees' Union was writing a letter to the P.S.A.C. in February 1977 as the representative of C.U.L.E. Moreover, two-thirds of the members of the Alliance Employees' Union were members of C.U.L.E. at the time the memorandum was posted.

2. With largely the same employee unit represented by C.U.L.E. and A.E.U. plus the same individual acting for both unions, I find it difficult to believe that the A.E.U. were in ignorance of the memorandum, or could believe that it did not apply to them.

3. I therefore am of the opinion that there was no violation of the statutory freeze imposed by section 70 of the Act, and I would have dismissed the complaint under section 79.

0434-78-U Spar Professional and Allied Technical Employees Association, (Complainant), v. Spar Aerospace Products Limited, (Respondent).

S-79 – Change In Working Conditions – Employer having entrenched practice of granting annual merit increases of varying amounts following an evaluation – Employer required to follow established pattern even though merit adjustments were discretionary – Unilateral refusal to consider merit increases improper

BEFORE: Donald D. Carter, Chairman, and Board Members O. Hodges and R. D. Joyce.

APPEARANCES: *James Hayes, S. S. Sachdev, E. Quittner and A. Carr for the complainant; J. Perry Borden, S. F. Waqué, E. A. Birch and M. R. Readman for the respondent.*

DECISION OF D. D. CARTER, CHAIRMAN, AND BOARD MEMBER O. HODGES:

1. This is a complaint under section 79 of the *Labour Relations Act* relating to a refusal by the respondent to implement merit increases for certain of its employees. At the hearing the scope of the complaint was narrowed to encompass only the allegation that the respondent's conduct violated the statutory freeze imposed by section 70 of the Act.

2. The complainant, on November 18, 1977, filed an application for certification in respect of certain monthly salaried employees. On May 29, 1978, the Board issued an interim certificate to the complainant pending the final resolution of the composition of the bargaining unit. Still unresolved is the question of whether certain persons are excluded from the bargaining unit because they exercise managerial functions. The focus of this complaint is the failure of the respondent to implement merit increases for those persons now included in the bargaining unit and those persons whose collective bargaining status has not yet been resolved.

3. The evidence indicated that for some years prior to certification the respondent

had followed the practice of granting both an annual merit increase and an annual cost of living increase. This practice was set out in a memorandum, dated November 20, 1973, to all monthly and confidential staff from the president of the respondent at that time, L. D. Clarke. The text of the Clarke memorandum is set out below:

In accordance with Company policy, the annual year end review of salaries and classifications will be underway shortly and will provide, where warranted, for salary adjustments consistent with performance and responsibilities, effective as of the beginning of the new year.

Company policy has also provided, in addition to the year end salary review and adjustments, for an annual mid-year cost of living review with resultant adjustments in remuneration becoming effective on July 1st of each year for all eligible full-time employees.

In view, however, of the unusually high cost of living increase since our last mid-year adjustment, your management has recommended that for this year only we make an exception to the customary once a year cost of living review and it is my pleasure to announce that such recommendation has been given approval by the Board of Directors of our Company. A further cost of living allowance will, therefore, become effective at the beginning of the new year which will reflect the recently accelerated increase in the cost of living, as determined by Statistics Canada, covering the six month period from the 1973 mid-year adjustment.

Please note that this additional cost of living allowance will not in any way alter or rescind the Company's established policy of a mid-year annual review of the cost of living.

The existing cost of living allowance is currently being paid to eligible employees as a bonus in addition to their basic salary, however, at the beginning of the new year such bonus will be incorporated (folded-in) with their basic salary. The new supplementary cost of living allowance will then be paid as an added bonus.

The Company's policy of reviewing salaries at year end and reviewing cost of living at mid-year should ensure that remuneration for all personnel concerned will be maintained on an equitable basis consistent with performance, responsibility and cost of living.

4. This practice of implementing annual merit and cost of living increases underwent a slight variation in 1975 when the timing of the cost of living increase and the merit increase was reversed. This change of policy was set out in a memorandum of April 14, 1975, signed by the respondent's president at that time, R. D. Richmond. The text of that memorandum reads as follows:

The Company policy during the past several years has provided for an annual year-end performance review with merit salary increases where warranted becoming effective the beginning of the new year. In addition, it has

also provided an adjustment in remuneration for all full time staff based on the change in the Consumer Price Index becoming effective on July 1st of each year. In 1973 and 1974 exceptions were made to provide also for adjustments at the beginning of the year.

My previous communication on this subject dated January 8, 1975 stated that the Management and Board of Directors were going to review the Company's policy pertaining to merit and cost of living adjustments in relation to prevailing economic and business conditions. This review was completed and it has been determined that the exceptionally high cost of living increases in the past two years when applied on a percentage basis to all personnel has left the Company little flexibility to provide significant merit increases to those individuals who have shown outstanding performance and achievement during the previous 12 months.

It has therefore been decided that in order to ensure that the correct emphasis will be placed on recognizing an individual's contributions and achievements the following will apply effective in 1975:

- (a) An annual cost of living review at year-end for all personnel with adjustments becoming effective from the beginning of the new year based on the published change in the Consumer Price Index over the preceding six month period.
- (b) An annual performance review at mid-year with merit salary adjustments where warranted becoming effective on July 1st each year, based on individual performance and achievement.

In order to implement this program a mid-year merit review will be made in 1975 and will result in nominal adjustments where warranted. This review should be considered as supplementary to the one made in January, 1975. The effectiveness of this more equitable and favourable salary review policy will be fully realized at the mid-year salary review in 1976.

5. There was no change in the respondent's policy of granting both an annual merit increase and an annual cost of living increase until May of 1978. The evidence indicates a clear practice up to that time of the respondent implementing an annual cost of living increase and also conducting annual merit reviews resulting in some additional form of salary adjustment for the monthly and confidential staff. The well-established practice of the respondent was to determine in its discretion the amount of money to be made available for merit increases in any given year, and then in its discretion to distribute that amount among the monthly and confidential staff. The distribution of the merit money, however, depended to some extent upon the merit assessments that were made by persons whose collective bargaining status is now in dispute. As for the cost of living adjustment, it is clear that the last increase for the monthly and confidential staff was implemented by the employer in January of 1978, after the complainant had filed its application for certification.

6. In May of 1978, however, the respondent indicated that the annual merit increase would not be implemented at the usual time for employees falling within the bargaining unit

or for persons whose collective bargaining status had not been resolved. At a meeting with employees at the respondent's Ormont Drive operation, E. P. Birch, vice-president, personnel, for the respondent, made it clear that merit increases for persons clearly within the bargaining unit would not be implemented at the usual time since this was now a negotiable matter, and that persons whose status was unresolved would receive a retroactive merit increase if it were found that they fell outside the bargaining unit. Substantially the same position was taken by Birch on May 10th when he met with employees at the respondent's Caledonia Road operation.

7. The complainant, through a letter from counsel, dated May 12th, informed the respondent of its position that the announcement was in contravention of the *Labour Relations Act*. The complainant and the respondent met on May 19th, apparently in an effort to resolve this question. The respondent agreed to submit a proposal at a later date, which it did at a meeting held on May 29th. This proposal was then set out in writing in a letter, dated May 30, 1978, from the respondent to S. Sachdev, the complainant's president. The text of that letter is set out below.

This will confirm our meetings of May 19, 1978 and May 29, 1978 which were arranged following correspondence to the Company's solicitors with respect to the 1978 performance review.

At the meetings with management on May 4, 1978 and May 10, 1978, I indicated something different than is set out in the May 12, 1978 correspondence. I did say that SPATEA will be responsible for negotiating merit salary increase level for those they will be representing.

At the beginning of May, 1978, the Company was under the clear impression that it would be negotiating with SPATEA pursuant to an interim certificate for which SPATEA had applied in the early part of April, 1978. Both parties were in agreement as to the scope of the interim certificate as of April 24, 1978 and we are at a loss to understand why the interim certificate has not yet been received. In the context of the application for an interim certificate, and in view of its obligation under The Labour Relations Act, the Company could not unilaterally effect any change in salary.

To attempt to provide a means for the parties to resolve the concern raised in the May 12 correspondence, the Company made a proposal to yourself and Mr. Quittner at our meeting yesterday. The Company proposal provided that if the Company implemented merit salary adjustments effective July 1, 1978 (with the merit salary adjustment budget determined by the Company in accordance with the same principles as applied in 1977) and if a cost of living adjustment is implemented on January 1, 1979 in accordance with past practice, the Association would agree that these adjustments would constitute the full salary adjustment for the period July 1, 1978 – June 30, 1979 and that the foregoing would be a term of the first collective agreement. Further, the Company proposed, that in the event no collective agreement was negotiated prior to July 1, 1979, there would be no strike or lock-out by members of the bargaining unit prior to that date.

We understand your position to be that the Company should effect the salary adjustments on July 1, 1978 and that the Association would take those salary adjustments into account in the wage demands during negotiations. This position supports the Company position that these salary adjustments are properly a negotiable issue.

I would respectfully submit that your summary rejection of the Company's position at our meeting of yesterday should be reconsidered in the context in which it was made, namely that constructive negotiation of issues other than salary adjustment could proceed without further delay pursuant to an interim certificate.

In a further attempt to reach an agreement with you on the question of merit salary adjustments, at this point the Company would be willing to waive the requirement that should a collective agreement not be negotiated prior to July 1, 1979, no strike or lock-out would occur prior to that date.

I would appreciate your advising me of your intentions at your earliest convenience.

8. The respondent's position at this point was that the implementation of the merit adjustments effective July 1, 1978, would no longer be conditional upon a promise that there be no strikes prior to July 1, 1979, but that this merit increase, and the subsequent cost of living increase, must be treated as the respondent's complete monetary offer. The complainant replied on June 4th, rejecting the amended offer and indicating its intentions to file a complaint with this Board in respect of the failure to implement the merit increases. Meanwhile, on May 27, 1978, the interim certificate had been granted to the complainant. Following the issuing of the certificate, the respondent was given notice of the complainant's intention to bargain in a letter dated June 12, 1978.

9. The complainant contended that the refusal to implement the expected merit increases ran contrary to the prohibitions in section 70 of the Act preventing the alteration of "the rates of wages, or any other term or condition of employment, or any right, privilege or duty of the ... employees", either where a trade union has applied for certification, or where notice to bargain has been given under either sections 13 or 45 of the Act. According to the complainant, while the respondent has the discretion to allocate funds for merit increases and has the discretion to allocate those funds according to established criteria, it is required by law to exercise this discretion. The merit review program, in the words of counsel for the complainant, is "an absolutely fundamental pillar of the established structure of compensation" and the withdrawal by the respondent amounted to "an effective penalty upon employees who have exercised their statutory right to organize". Counsel argued that a finding that the withdrawal of the merit increases was other than in violation of section 70 would run against the grain of previous Board decisions in such cases as *A. N. Shaw Restoration*, Board File 0242-78-U; *Carleton University*, [1978] OLRB Rep. Mar. 210; and *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049. Reference was also made to a decision of the U.S. Court of Appeals (Fifth Circuit), *NLRB v. Dothan Eagle, Inc.* (1970) 75 LRRM 2531 where that Court expressly upheld a finding of the NLRB that a withholding of progression increases constituted an unfair labour practice.

10. The respondent's principal argument was that once a certificate is granted to a trade union there is created a new legal regime, prohibiting all wage increases to individual employees that are not the product of collective negotiations between the union and the employer. Authorities cited by the respondent in support of this approach were *Royal Bank of Canada* (1978), 78 CLLC ¶ 16,132 (C.L.R.B.); *Kodak Canada Ltd.*, [1977] OLRB Rep. Jan. 49; and *R. v. Canadian General Electric Co.*, [1961] O.W.N. 117 (Ont. Co. Ct.). The annual merit adjustment was not due until a time following the giving of notice to bargain and was, therefore, prohibited by the terms of section 70(1). To require the respondent to award the discretion merit increases in these circumstances, in the words of counsel for the respondent, "would be to undermine the duty and responsibility of the union to bargain collectively on behalf of its members".

11. In the alternative, counsel for the respondent argued that, even if the respondent were obligated under section 70 to grant the merit increases, in the particular circumstances of this case, such an obligation would become frustrated. According to this argument the unresolved collective bargaining status of those persons who in prior years had carried out the performance appraisal program now made it impossible to carry out the programs as before. It was further argued that the complainant should be estopped from pressing the complaint under section 70, since its assertion amounted to a representation that the disputed persons did in fact exercise managerial functions, a position contrary to that taken by the complainant in the certification application. Finally, the respondent characterized this complaint as an attempt to harass the respondent both in regard to the certification application and in regard to the negotiations which had just commenced.

12. This case requires us to determine the exact nature of the freeze imposed by section 70(2) upon the giving of notice to bargain. Is it a freeze that prohibits all unilateral action by an employer in respect of individual employees, as suggested in the *Royal Bank* decision, *supra*, or is it a freeze that simply requires the employer to conduct employment relations according to the pattern established before the union entered the picture? The question is a difficult one, and it should not be surprising that the jurisprudence does not point consistently to a single answer. It must be kept in mind, moreover, that the statutory basis of this jurisprudence varies from jurisdiction to jurisdiction. The starting point for the Board, therefore, must be its own statute and jurisprudence.

13. Section 70 of the Act imposes a freeze in two circumstances – either where notice of an application for certification has been received by an employer or where notice to bargain has been given by a union. Although only the latter situation applies in this case, it is useful to set out section 70 in its entirety:

70. – (1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

- (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
- (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 37 applies *mutatis mutandis* thereto.

14. A canvass of the jurisprudence relating to this section must necessarily begin with *R. v. Canadian General Electric Co. Ltd.* (1961), O.W.N. 117 (Ont. Ct. Ct.). This decision dismissed the appeal from an earlier dismissal of a charge laid under section 53 of the Act [now section 70(1)]. Schwenger, Co. Ct. J., held that the failure of an employer, upon the commencement of bargaining, to continue its "job improvement program" providing for periodic wage increases did not constitute a violation of the statutory freeze, reasoning that the giving of notice to bargain served to terminate all existing contracts of employment and to leave frozen the situation existing at the time these contracts were terminated. This approach suggests that any unilateral employer action in respect of the individual employees would be precluded by the freeze.

15. A similar approach, however, does not appear to have been taken by the Board in later interpretations of this section. In *Canadian General Electric*, [1965] OLRB Rep. Dec. 649, the Board was faced with the question of whether the statutory freeze prevented an employer from laying off two employees once a union had served notice to bargain. The Board found that a term of their contract of employment was that they could be laid off for lack of work, and went on to dismiss the complaints. The rationale underlying the statutory freeze was explained by the Board in these terms:

"... In our opinion it is manifest that the aim and policy of this section is directed to the protection of the union's bargaining rights and the promotion of meaningful and effective collective bargaining. Once the notice to bargain is given, this section operates to prohibit all alterations without the union's consent, whether they be beneficial or detrimental to the employees concerned, of their wages or other terms or conditions of employment, including any right, privilege or duty of the employer. The section seeks to protect the union's bargaining rights and to promote effective collective bargaining by preserving and maintaining the union's bargaining position for the period stipulated, on the basis of the contracts of employment existing between the employer and the employees on the date of the notice. In other words, the legislation is directed at maintaining the *status quo* of the wages and other terms and conditions of employment existing under the contracts of employment between the employees and their employer, during the particular period of time stipulated in the section. The union is, therefore, given the opportunity, during this time, to enter upon negotiations and to bargain for a collective agreement, having regard to a fixed point of departure, namely the wages and working conditions existing at the time of notice. In this respect the union's bargaining during this stipulated period will not be undermined nor will it be required to keep pace with and alter its position in accordance with changes in terms or conditions of employment which might otherwise be made as a result of the employer being at liberty to deal directly with the employees. It will be noted that the section also gives similar protection to the bargaining position of the employer."

16. This explanation of the statutory freeze does not sit comfortably with that given by Schwenger, Co. Ct. J., in the earlier *Canadian General Electric* case. The approach of the Board appears to differ in that the freeze would not serve to terminate individual contracts of employment but only to prevent their alteration. All matters would not stay in *status quo*, as suggested in the earlier decision, but only the employment relationship as it existed at the time of serving of notice to bargain. The approach appears to be one of simply requiring the employer to conduct business as before.

17. This approach of "business as before" became clearer in subsequent decisions of the Board. In *Scarborough Centenary Hospital*, [1967] OLRB Rep. Jan. 1049, the Board held that an employer did not violate the freeze imposed by section 59(1) [now 70(1)] where, after notice to bargain had been given, it continued its policy of granting annual increases on the anniversary of employment of its employees. These annual increases were awarded according to an established wage scale which provided for annual increases within a fixed range, and it was clear that the employer had established a practice of granting such annual increases prior to the union giving its notice to bargain. The Board clearly took the approach that the freeze simply required the employer to conduct its employment relations in the same manner as obtained prior to the giving of notice to bargain. In taking this approach, the Board expressly adopted the view of the Quebec Court of Queen's Bench in *Kiddie Togs Manufacturing Co. Ltd. v. R. ex rel. Deutch* (1963), 65 CLLC, ¶ 14,040, that the freeze did not prevent an employer from continuing "a policy that was in vogue".

18. The statements made by the Board in *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49 do not represent a move by this Board in a different direction, as argued by counsel

for the respondent. The *Kodak* decision dealt with a situation where notice had been served to renew an existing collective agreement. In these circumstances the Board held that the freeze served, not only to freeze the terms and conditions of employment contained in the expired collective agreement, but also to freeze all other legal incidents of the collective bargaining relationship established under the expired collective agreement, including the union security provision. Where there is no pre-existing collective agreement, as in this case, then the freeze under section 70(1) can be no different than the freeze imposed earlier when notice of application for certification is received by the employer. What the statutory freeze does is to simply maintain the totality of the employment relationship in the pattern existing at the time that the freeze becomes effective, whether it be a pattern established by prior dealings on an individual basis or prior dealings on a collective basis, making it the starting point for negotiations.

19. It should be emphasized that the “business as before” approach dictates that the totality of the employment relationship be the subject of the freeze. In interpreting section 70, the Board does not place undue influence upon the term “rates of wages” but recognizes that this term must be read in the context of the other words in that section. The words “any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees” must also be given meaning and, in the Board’s view, section 70 read as a whole manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety.

20. This is not the first occasion on which the Board has taken this wider view of the statutory freeze. In *Parr’s Print and Litho Ltd.*, [1973] OLRB Rep. Nov. 597, the Board held that a change in hours of work occurring subsequent to the giving of notice to bargain did not violate the statutory freeze because it was made in accordance with a predetermined scheme. In that case the hours of work had been initially changed on an experimental basis and the change in question was a simple reversion to the established pattern. The freeze did not apply because there was no change in the existing pattern.

21. The existing pattern of an employment relationship may contain a prospective element, as illustrated by the Board’s decision in *Scarborough Centenary Hospital*, *supra*. In that case the Board concluded that “rates of wages” must refer not only to the amount actually paid at the date of the imposition of the freeze but also to any amounts promised prior to the freeze that were to be implemented at a time falling within the period of the freeze. Again, in *Hostess Food Products Ltd.*, [1975] OLRB Rep. Mar. 210, the Board recognized that a prospective element can be contained within a frozen employment relationship pattern, finding a failure to implement a substantial wage increase announced by the employer prior to receiving notice of an application for certification to be a violation of section 70 of the Act.

22. This recognition of the prospective elements of an existing pattern of an employment relationship gives some meaning to the term “privilege” in section 70. Some promises do give rise to expectations that harden into privileges, and such privileges are not beyond the reach of the statutory freeze. Two recent Board decisions make this point clear. In *A. N. Shaw Restoration Ltd.*, Board File No. 0242-78-U, the Board held that a union which had waived certain rights under its collective agreement could not adopt a different posture during the statutory freeze and insist upon complete compliance. Even more recently, in *Scarborough Centenary Hospital Association*, Board File No. 0447-78-U, the Board found

that section 70 prevented an employer from revoking the privileges of free parking for the period of the freeze. It should not be surprising, then, that the Board has interpreted section 70 as freezing not just existing wages, but also any firmly established promises relating to future wages.

23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

24. The Board recognizes that this approach differs from that taken by our federal counterpart in *Royal Bank of Canada, supra*. That Board appears to have interpreted the freeze as prohibiting any unilateral action by the employer during the period of the freeze. Such actions, in that Board's view, would be "incompatible with the exclusive role of a bargaining agent and the collective bargaining regime of the Code". This reasoning overlooks the fact that a full collective bargaining regime is not created by the mere giving of notice to bargain. Rather, during the period of the freeze, an interim legal regime is imposed by operation of section 70 as the parties move from the regime of the individual contract of employment to one governed by the terms of a collective agreement. This interim legal regime, in our view, should not place an employer in a legal straitjacket yet it should not at the same time lead to employees perceiving themselves as being penalized for engaging in collective bargaining. These two ends, in this Board's view, are best achieved by interpreting section 70 as requiring the parties to simply conduct "business as before".

25. The facts of this case reveal a well-established practice of granting both an annual merit increase and an annual cost of living increase pursuant to a clearly announced policy. This is not a situation where it can be said that there is no established pattern of such increases. Both cost of living and merit increases have been awarded on an annual basis for a number of years. In fact, the evidence indicates that the annual cost of living adjustment was implemented by the respondent at a time after it had received notice of the application for certification. Nor is this a case where economic circumstances now restrain the employer from awarding a merit increase. In its proposal of May 30th, the respondent expressed its willingness to implement the merit adjustments, and an additional cost of living increase on January 1, 1979, provided that the complainant not seek any further monetary increase in negotiations.

26. The respondent, however, emphasized the discretionary nature of the merit adjustment, arguing that its discretion to determine both the total amount to be awarded for merit, and to grant individual merit increases, made it impossible for the Board to supervise a freezing of this element of the employment relationship. While this aspect of the case gave the Board some concern at the hearing, it is our conclusion that this is not a situation where there exists a complete discretion. A policy governing merit adjustments, and a policy for

implementing such adjustments, has existed for a number of years. It was clear from the respondent's letter of May 30th that an amount has already been set aside for such adjustments, and that implementation of individual increases was possible. Even if these facts were not taken into account, it is clear that the freeze can extend to these elements of the respondent's discretion that had hardened into a well-established pattern. The freeze requires a party to carry on business as before, and any order directing compliance with the freeze would only require this standard from the respondent. The discretionary aspects of the adjustments in this case, therefore, do not prevent the freeze under section 70(1) from applying.

27. On the facts the Board must conclude that the respondent's failure to implement the merit adjustments on July 1st was in violation of section 70(1) of the Act. We do not accept the respondent's argument that this obligation was frustrated by the unresolved collective bargaining status of certain persons. The respondent's own letter of May 30th makes it very clear that it was prepared to implement merit increases as of July 1st, provided that there be no further salary adjustment except for the cost of living increase on January 1, 1979. Even if it can be said that the contractual doctrine of frustration applies to the obligations under section 70(1), the respondent, in our view, has fallen short of establishing that such obligations are impossible to meet.

28. The respondent's position in the letter of May 30th, moreover, sets to rest any argument that the lodging of this complaint gives rise to an estoppel on the part of the complainant. The complainant, as we understand it, simply asks that the merit increases be implemented, a matter that does not depend directly upon the collective bargaining status of those persons still in dispute, as evidenced by the May 30th letter.

29. While this complaint has been brought immediately prior to the commencement of negotiations, the Board does not regard it as being in any way vexatious. The timing of the merit increase may be awkward for the respondent, creating a higher monetary point of departure for negotiations, but these increases are a factor that must be taken into account at negotiations. Employees who have just received an increase as the result of the operation of section 70 should realize that there will be less money available for any wage increases in the collective agreement. It is clear from the letter of May 30th that the complainant has taken a responsible position in this respect.

30. The Board, therefore, finds that the respondent has violated section 70(1) of the Act. The respondent is directed to implement the annual merit increase forthwith according to its established practice. The Board remains seized of this matter to deal with any disagreement between the parties that might arise out of the implementation of this direction.

DECISION OF BOARD MEMBER R. D. JOYCE:

1. I find myself in disagreement with the majority for the two reasons detailed below.

2. In my respectful opinion the decision of the majority fails to recognize the difference to be drawn between "rates of wages" and "privileges" as used in section 70. It seems to be that the term "privilege" should be interpreted as something different from that of wages when this item is dealt with specifically within the term "rates of wages". These terms,

as I understand the rules of interpretation, should be interpreted as being mutually exclusive, with the result that "privilege" should be given a different meaning than that of wages. The term "privilege" covers such conditions as rest periods, coffee breaks and wash-up time.

3. What is meant by "rates of wages"? The "rates of wages" to which the respondent here is committed is the *range* established for each classification with adjustments within the range being dependent upon the discretion of the respondent. There is no personal rate as such which an employee can claim so long as he is properly classified. Accordingly, the term "rates of wages" in section 70 does not include individual adjustments due to the discretionary application of the respondent.

4. As an example, if the established range for a given job is \$300-\$400, the respondent may continue to grant salary changes to individuals who are transferred to jobs within this established range or who otherwise progress within this range. Indeed the respondent may be required to grant such salary changes in accordance with a declared wage payment plan. However, the respondent is, during the period in question, not permitted to alter the established range of \$300-\$400.

5. It is also necessary to examine the policy underlying section 70. It is my respectful opinion that disproportionate emphasis has been placed in prior decisions of the Board on the protection afforded employees under section 70. The decisions seem to ignore the apparent balance intended by imposing equal limitations on trade unions as well as employers. Within this context in my opinion one of the basic purposes underlying section 70 is to prohibit either party by disturbing the status quo. Neither of the parties is to be disadvantaged in the collective bargaining process by unilateral action taken by the other party. Further, if the scheme of section 70 is to preserve existing conditions in order to protect the climate of collective bargaining, which I assume to be the case, by clear implication neither party should be required to do something which will prejudice its position in the negotiations unless it does violence to the interests of the employees.

6. In the present case, the complainant union is requiring the employer to raise the rates of pay following certification and before negotiations on compensation takes place. One of the most critical elements in the negotiations is that of compensation, whether in the form of wages or benefits, or in other words the total compensation "package". To require an employer to increase rates of pay while the union is legally entitled to bargain the total "package" obviously places the employer at a disadvantage in bargaining. To suggest that the increase will be taken into account by the employees or their union is neither realistic nor practicable because of the way in which bargaining takes place. The decision of the majority distorts the basis for negotiations in favour of the complainant by requiring that the floor for wage demands be increased just as bargaining is to commence. The respondent is obviously disadvantaged from the outset in the negotiations.

7. Withholding the merit program does no real damage to the complainant nor to the employees because of the complainant's ability to bargain on it immediately as part of its economic demands. As a result, the respondent should not be directed to implement wage adjustments when the employees through the company have at their disposal the more equitable remedy of bargaining on compensation. It would indeed be ironic if one of the applicant's bargaining demands concerns the elimination of the system of merit pay which is almost invariably the situation when a union seeks its initial collective agreement.

0526-78-M Local 800 of the United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant), v. **Spiers Brothers Ltd.**, (Respondent # 1), Mechanical Contractors Association of Sudbury, (Respondent # 2).

Arbitration – Section 112a. – Parties Construction Industry – Section 70 freeze following statutory termination of ICI agreements held triggered by notice to bargain given by new Employee Bargaining Agency – Board held both employer and old unaccredited association proper parties in grievance proceeding arising during freeze period.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *C. M. Mitchell, Richard Schofield and Louis G. Lalande for the applicant; S. C. Bernardo and Vince Brown for respondent # 1; Robert Spec for respondent # 2.*

DECISION OF THE BOARD: September 25, 1978.

1. This is the application made under section 112(a) of The Labour Relations Act to which the respondent has raised the preliminary objection that the facts giving rise to the grievance to be arbitrated arose on May 29, 1978 and the referral to arbitration was made on June 13, 1978 at which times there was no collective agreement in existence.

2. The Board issued a decision dated August 29, 1978 in which it indicated that written reasons would be subsequently provided and the Board therefore now sets out its reasons.

3. There is no dispute that the collective agreement between the Mechanical Contractors Association of Sudbury and Local 800 expired on its own terms as of April 30, 1978. This contract, during its term, covered employees of the respondent employed in the industrial, commercial and institutional section of the construction industry, as well as employers employed in the residential sector. It is agreed that the Mechanical Contractors Association of Ontario has been designated by the Minister as the employer bargaining agency and the Provincial Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the employee bargaining agency and that bargaining has taken place and has resulted in a collective agreement which became effective June 15, 1978. It is further agreed that notice to bargain was served by Local 800 on February 27, 1978 on the respondent "exclusive of the provisions made in Bill 22, 1977" and that the issue in dispute arises out of the industrial, commercial and institutional sector of the construction industry.

4. The collective agreement insofar as it relates to the ICI sector ceased to operate both on its own terms and by virtue of section 132(2) of the Act, as of April 30, 1978 so that no collective agreement was in force at the time the grievance arose. While section 70 of the Act would normally operate to maintain the employment regime created by that collective agreement (including the grievance and arbitration procedure) following its expiry, the respondent argued that in the unique circumstances of this case there had been no notice to bargain under section 45 of the Act and therefore section 70 could not apply.

5. What distinguishes this case is that the parties are now subject to the new scheme for province-wide bargaining in the ICI sector of the construction industry. In the absence of the statutory scheme, set out in sections 125 to 136 of the Act, it is obvious that the applicant would have been entitled to give notice to bargain under section 45, and section 70 would have been set in motion. The combined effect of these provisions, however, is to leave the negotiation of a provincial agreement in the hands of an employee bargaining agency. All bargaining rights of affiliated bargaining agents, including the right to give notice under section 45, vest in the employee bargaining agency for the purpose of conducting negotiations at the provincial level. Because it falls within the structure of province-wide bargaining, it is clear that the applicant no longer could give notice under section 45, and the notice given on February 27, 1978 must be regarded as being ineffective insofar as it purports to relate to bargaining in respect to the ICI sector.

6. The fact that this notice was ineffective, however, does not mean that no notice to bargain can be given. The applicant's right to give notice to bargain became vested in its employee bargaining agency upon designation. The giving of notice to bargain by the employee bargaining agency, therefore, would serve to set in motion the statutory freeze under section 70. The question, then, is whether effective notice to bargain was given by the employee bargaining agency prior to the occurrence of the events giving rise to the grievance. If so, then the regime established under the expired collective agreement between the applicant and respondent would be maintained by section 70(1) and any differences relating to the application of the freeze, by operation of section 70(3), could be resolved through grievance arbitration.

7. Implicit in the Board's decision of August 29, 1978 is the assumption that the bargaining which preceded the conclusion of the provincial agreement of June 15, 1978 must have been conducted pursuant to the serving of notice to bargain by the employee bargaining agency prior to the occurrence of the events giving rise to the grievance. If this implicit assumption is not warranted by the facts, the Board will entertain further representations prior to hearing the merits. If the assumption is warranted then section 70 was operative at the time when the facts arose giving rise to this referral and such referral may be entertained by the Board under section 70(3).

8. The respondent also, by way of preliminary objection, argues that Spiers Brothers Ltd. is not a party to the collective agreement which expired April 30, 1978 and that the application should be dismissed as having not named the Mechanical Contractors Association of Sudbury as respondent instead of Spiers Brothers Ltd., relying on *Ainsworth Electric*, July [1977] OLRB 399 and *McKee & Company of America*, April [1978] OLRB 351. In both of those cases the Board was dealing with a collective agreement between an accredited employer's association as the party to a collective agreement and therefore by virtue of section 112(a) and 116 of the Act clearly the entity which must either carry the arbitration (as in *Ainsworth* case) or against whom remedial action would be granted in the first instance is the appropriate party.

9. Here the Mechanical Contractors Association is not an accredited employer's organization but has entered into a collective agreement on "behalf of the Contractors listed in Schedule A" which includes Spiers Brothers. The collective agreement defines rights and obligations and working conditions of employees of individual contractors bound by the agreement as well as rights and obligations of the individual contractors including in Article

14.7 of the agreement, the provision "the Contractor or the Union may submit a grievance to the other ...". Further in Article 15 of the agreement it is clear that it is the individual contractor or the union who has the right of carriage of a grievance and that an arbitration determination is intended to run against the individual contractor. We, therefore, conclude that Spiers Brothers Ltd. is an appropriate respondent against whom remedial relief is sought. We are also of the opinion that the other party to the collective agreement, namely, the Mechanical Contractors Association of Sudbury should have been named as a respondent.

10. The Board, having regard to the fact that the Mechanical Contractors Association did receive notice of these proceedings and was present at the hearing, and having regard to the fact that the Association did participate in the grievance discussion at an earlier stage, made an order at the hearing that the Mechanical Contractors Association of Sudbury be named as a respondent in these proceedings.

11. The Board records that no evidence was heard as to the merits of the case and this Board has not become seized of the matter which conclusion was supported by agreement of all parties including the Mechanical Contractors Association.

0218-78-R Lloyd Gloster and Jack Falldien, (Applicant), v. The Northern Ontario Newspaper Guild, Local 232 The Newspaper Guild (CLC, AFL-CIO), (Respondent), v. **The Sudbury Star**, (Intervener).

Termination – Person signing petition who was not a member of unit at time of signing – Signature discounted

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Jack Falldien and Lloyd Gloster for the applicant; C. M. Mitchell, Bill McLeman, Peter Desilets, Corinne Murray and W. Ryrie for the respondent; J. Friesen for the intervener.*

DECISION OF THE BOARD: September 20, 1978.

1. This is an application for termination of bargaining rights under section 49 of The Labour Relations Act. The parties are agreed that there are four collective agreements embodied in a single document and covering four separate bargaining units which may be briefly described as follows:

Bargaining Unit "A" – All full-time employees in the News and Editorial departments

Bargaining Unit "B" – All regular part-time employees in the News and Editorial Depts

Bargaining Unit "C" – All full-time employees in the Accounting Dept

Bargaining Unit "D" – All full-time employees in the Circulation Dept

The parties further agreed that the application is timely in respect to each unit. The respondent made a preliminary objection that neither of the applicants were employed in bargaining unit B or bargaining unit C and that therefore, under section 49(2) of the Act the representative issue respecting these units was not properly before the Board. The Board, in reserving judgment in respect to this matter, noted that the parties before it (including the parties to the collective agreements) had exhibited a genuine uncertainty as to whether the scope of coverage clause in the Memorandum of Agreement and which was effective May 1st, 1976 through April 30, 1978 should be effectively interpreted as constituting an "all employee" unit or a series of individual separate units. Each individual unit was the subject of a initial separate certification by this Board with such certifications issuing in respect to units A and C on April 25, 1973, in respect to unit B on September 27, 1973 and in respect to unit D on March 30, 1977. In respect to this last unit it was added to the Memorandum of Agreement by way of a letter of agreement between the parties and became an addendum to the Memorandum.

2. The petition supporting the applicant's application contained signatures of 7 persons who appeared on the employer's list of full-time News and Editorial Department employees. The employer's lists indicate there to be a total of 22 full-time employees in these departments on the date of application. The Board finds that less than 45% of the employees in Bargaining Unit "A" have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union and the application insofar as it relates to Bargaining Unit "A" must be dismissed.

3. In respect to Bargaining Unit "B" the petition supporting the application contained the signature of one person who appeared on the employer's list of part-time employees in the News and Editorial Depts and the employer's lists indicated there to be three part-time employees on the date of application. The Board finds that less than 45% of the employees in Bargaining Unit "B" have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union and the application insofar as it relates to Bargaining Unit "B" must be dismissed.

4. In respect to Bargaining Unit "C" no documentary evidence was filed with the Board to indicate that the application was supported by any of the six persons indicated by the employer's lists to be employed in the Accounting Dept and the application insofar as it relates to Bargaining Unit "C" must be dismissed.

5. In respect to Bargaining Unit "D" the petition filed with the Board contained the signatures of 7 persons who appeared on the employer's lists of full-time employees in the Circulation Dept at the date of application. The employer's lists indicate there to be a total of 8 full-time persons in the Circulation Dept at the date of application. There was also filed with the Board a written document signed by three persons who had previously signified in writing their desire to be no longer represented by the respondent trade union and which document bears in its heading the following language:

"We, the undersigned, employees of the Sudbury Star, hereby, revoke

our signatures on a petition asking for termination of the bargaining rights of The Northern Ontario Newspaper Guild Local 232, The Newspaper Guild (A.F.L.-C.I.O.-C.L.C.) and hereby confirm our wish to be represented by The Northern Ontario Newspaper Guild Local 232 of The Newspaper Guild (A.F.L.-C.I.O.-C.L.C.)”

6. Mr. Lloyd Gloster, employed as a Circulation Representative gave testimony as to the origination and circulation of the petition supporting the application and that he had secured signatures of all full-time and part-time employees of the Circulation Dept on March 3rd and March 4, 1978. He testified as to securing the signatures of four persons, who he identified on the petition filed with the Board, during a coffee break and that included in this group of four was one employee who at that time was employed on a part-time basis. Subsequent to the hearing the Board of its own motion appointed a Labour Relations Officer to examine into the status of employees in the Circulation Dept at the relevant times. The report of the Labour Relations Officer was issued to the parties on July 18, 1978 and written representations made to the Board in respect to such report.

7. The information extracted from the payroll records of the employer indicate that one, George Boudreau was a full-time employee at the date of application, April 29, 1978 and had achieved that status as of April 17, 1978. Accordingly, Boudreau is properly included in the list of employees in the bargaining unit at the time the application was made.

8. There is a further question to be determined and that is as to what weight is to be given to a signature of a person who is not a member of the bargaining unit at the time of affixing his signature. In this case, Gloster testified, and the other evidence supports, that Boudreau was not a member of the bargaining unit at the time (March 2nd or 3rd) that he signified in writing that he no longer wished to be represented by the trade union. On its face, such an act is meaningless in that it indicates a desire to no longer continue a non-existent relationship, and the fact that subsequently the relationship (non-existent at the time of the expression of desire) does come into existence cannot retroactively accord meaning to an act which was itself meaningless at its inception, unless some re-affirmatory step is taken subsequent to acquiring the status which would give meaning to the Act.

9. The Board is satisfied that the documentary evidence supporting the application represents the written voluntary signification of those persons whose signatures appear thereon. The Board is further satisfied that the documentary evidence of the respondent union represents the voluntary revocation of such support of the application. Counsel for the applicant argues that the two documents indicates an uncertainty as to the wishes of the employees involved and that a representation vote should be directed to eliminate the uncertainty.

10. In our view this type of situation cannot be considered analogous to the Board's usual practice in certification applications where a petition or statement of desire by a group of employees is accorded weight such as to cause the Board, in the face of evidence which would, absent the petition, grant an outright certification to nonetheless seek additional evidence by directing a vote. In that case the Board is dealing with documentary evidence of differing probative values whereas in a case such as this, in weighing the evidence of equal probative values, the Board's long standing practice has been to consider that the subsequent conflicting act nullified the earlier act.

11. The Board therefore finds that the application is supported by three employees in Bargaining Unit "D" which is comprised of eight employees. The Board finds that less than 45% of the employees in Bargaining Unit "D" have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union and the application insofar as Bargaining Unit "D" is concerned is dismissed.

0562-78-R Roy E. C. Baker, (Applicant), v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural & Ornamental Ironworkers, (Respondent), v. **Venture Metalcrafts Limited**, (Intervener).

Termination – Petition in support of application indicating wish to resign from membership
– Evidence indicating desire to terminate bargaining rights, not merely withdraw from membership –
Application found voluntary – Representation vote ordered

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

APPEARANCES: Roy E. C. Baker and F. J. Matthews for the applicant; T. Kuttner, W. Chappell and R. Sim for the respondent; W. J. McNaughton and R. N. Shepherd for the intervener.

DECISION OF THE BOARD; September 8, 1978.

1. The name: "Shopmens Branch of Local 834 of the Bridge, Structural & Ornamental Ironworkers Union" appearing in the style of cause of this application as the name of the respondent is amended to read: "Shopmen's Local Union No. 834 of the International Association of Bridge, Structural & Ornamental Ironworkers".

2. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent trade union no longer represents certain employees of the intervener.

3. The respondent represents the employees in the following bargaining unit, namely:

all employees employed by Venture Metalcrafts Limited at its shop, or shops, in the Municipality of Metropolitan Toronto and City of Oshawa, Ontario, including those engaged in production and/or normal maintenance work save and except foremen, persons above the rank of foreman, office or clerical staff, draftsmen, watchmen, guards, persons engaged in major extensions or major remodelling of the company's premises, and persons engaged in field erection work.

4. The parties are in agreement that the application is timely and that the applicant is an employee within the bargaining unit set out above.

5. On the date of the filing of the application there were 11 employees in the bargaining unit. The documentary evidence filed in support of the application consists of eleven hand written statements of desire each bearing the signature of one of the employees in the bargaining unit. Each of the statements of desire, with one or two minor variations, states as follows:

“I (name) no longer wish to be a member of Local 834 branch of The Bridge, Structural and Ironworkers Union.”

6. Counsel for the respondent contended that since the headings on the statements of desire refer only to a desire not to continue to *belong* to the respondent, the statements should not be accepted as a signification by employees that they no longer wish to be *represented* by the respondent. While it is true that section 49(3) requires that with respect to applications such as this the Board must determine whether not less than 45 per cent of the employees in a bargaining unit have voluntarily signified in writing that they no longer wish to be represented by a trade union, nevertheless it is our view that in so doing the Board should not be unduly technical with respect to the wording used by employees to express their wishes. In this regard we would adopt the reasoning of the Board in the *Grenwood Industries Ltd.* case [1976] OLRB Rep. Aug. 417, where, when faced with a statement of desire similar in certain respects to the ones now before us, the Board stated (at page 419):

“It is the intention of section 49 that it shall be the primary concern of the Board to ascertain the wishes of the employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes, would be unnecessarily fettered, if we were to adopt the ‘forms of action’ approach suggested by Mr. Sack. The right of a group of employees to bring their written wishes before The Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act.”

7. The evidence led at the hearing establishes that the statements of desire were executed following discussions among the employees concerning the matter of continued representation by the respondent. In these circumstances we are of the view that it would be quite artificial to regard the statements of desire as reflecting merely a wish to withdraw from membership in the respondent. We are therefore prepared to accept the statements of desire as written significations by the employees who signed them that they no longer desire to be represented by the respondent.

8. Mr. Roy Baker, the applicant, gave uncontradicted testimony concerning 9 of the 11 statements of desire which were filed in these proceedings. According to Mr. Baker he hand-printed a “master copy” of the wording to be used on individual statements of desire. During non-working hours Mr. Baker handed out the master copy to individual employees so that they could take it home and copy out the wording in their own hand writing, although Mr. Baker did write out the heading for one employee with a bad arm. Each of the

resulting statements of desire was later signed by the employee in the presence of Mr. Baker and retained by Mr. Baker. Mr. Baker forwarded the 9 statements of desire obtained in this manner to the Board. Mr. Baker indicated that he had had no involvement whatsoever with the other two statements of desire and he stated that he assumed that they had been prepared and forwarded to the Board while he was on holiday.

9. There is nothing in the evidence to suggest that management had any involvement with the statements of desire or that management gave its support to the applicant.

10. Counsel for the respondent contended that the evidence led in support of the 9 statements of desire with which Mr. Baker was involved was deficient in that no evidence was led as to either the custody of the "master copy" each time that it was given to an employee or as to the custody of each statement of desire after it had been written out by the employee involved but prior to it being signed in the presence of Mr. Baker. The Board is concerned that it hear evidence with respect to the custody of statements of desire such as these so that it can be assured that management played no role with respect to their origination or circulation and that the circumstances surrounding their custody were not such that employees might reasonably have assumed that management would learn who did and who did not sign a statement. Where it is reasonable for employees to assume that management will have access to this information, it is possible that they might sign a statement of desire either out of a desire to ingratiate themselves with management or out of a fear of possible management retaliation.

11. In the instant case Mr. Baker gave first hand testimony as to the custody of each of the 9 statements of desire with which he was involved from the time of their execution to the time that he forwarded them to the Board. Nothing in his testimony leads us to suspect that they might have been signed out of a concern that management might either have been involved in their origination or might later have an opportunity to ascertain who did and who did not sign them. Further, the mere fact that there is not first hand evidence as to the custody at all times of the unsigned "master copy" of the wording to be used on the statements of desire or of the statements of desire after they had been written out by the employees but before they had been signed does not to our minds give rise, in the circumstances of this case, to a reasonable concern that employees might have been improperly influenced into either originating or signing the documents.

12. Having regard to the above, the Board is satisfied that the 9 statements of desire referred to by Mr. Baker in his testimony are voluntary significations by the employees who signed them that they no longer wish to be represented by the respondent. However, lacking any evidence concerning the other two statements of desire we are unable to accept them as voluntary significations of the two employees who signed them.

13. In these circumstances, the Board finds that not less than 45 per cent of the employees of the intervener in the bargaining unit at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on July 24, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 49(3) of the Act.

14. Accordingly we direct that a representation vote be taken of the employees of Venture Metalcrafts Limited. Those eligible to vote are all employees employed by Venture Metalcrafts Limited at its shop, or shops, in the Municipality of Metropolitan Toronto and City of Oshawa, Ontario, including those engaged in production and/or normal maintenance work, save and except foremen, persons above the rank of foreman, office or clerical staff, draftsmen, watchmen, guards, persons engaged in major extensions or major remodelling of the company's premises, and persons engaged in field erection work, on the date hereof who have not voluntarily terminated their employment or been discharged for cause between the date hereof and the date the vote is taken.

15. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Venture Metalcrafts Limited.

16. The matter is referred to the Registrar.

0535-78-R The Toronto Building and Construction Trades Council; International Union of Bricklayers and Allied Craftsmen, Local 2, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicants), v. **West York Construction Limited, and Bau Canada Limited**, (Respondents).

Related Employer – Dormant company reactivated and engaging in related business activities – Applicant seeking declaration immediately upon knowledge of related company – Declaration made.

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *S. B. D. Wahl, D. Johnson and R. Stroud for the applicants; Adam Kunst for the respondents.*

DECISION OF THE BOARD: September 8, 1978.

1. This is an application under section 55 of The Labour Relations Act wherein the applicants are seeking a declaration that a sale of business did take place between the respondents, or alternatively the respondents should be treated under section 1(4) of the Act as constituting one employer for the purposes of the Act. At the hearing the Board heard evidence and argument only with respect to the declaration sought under section 1(4) of the Act.

2. Mr. Adam Kunst testified on behalf of both respondents which are hereinafter referred to as "West York" and "Bau".

3. The parties agree that West York is bound by the collective agreement between the Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen and The Masonry Industry Employers Council of Ontario covering bricklayers, stonemasons and plasterers (hereinafter referred to as the "Provincial Agreement") by means of West York's membership in the General Contractors Section of the Toronto Construction Association. The parties agree also that West York has been bound since 1967 by a standard form Working Agreement with The Toronto Building and Construction Trades Council and subcontract only to individuals or companies whose employees are members of unions affiliated with the Council.

4. Mr. Kunst was quite forthcoming in his testimony and discharged fully the onus placed on the respondent under section 1(5) of the Act. In fact, during the course of his testimony he admitted that the two companies had a close relationship. This evidence must be considered in the light of the criteria which the Board normally applies in this type of application. Those criteria were set out in re: *Walters Lithographing Company Limited* [1971] OLRB Rep. July 406 as being (1) common ownership of financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. Since the Walters Lithographing case the Board has said on numerous occasions that it is not necessary for each criterion to be met and no single criterion is likely to decide the issue. There is no evidence before the Board in respect to the fourth criterion, however, the Board is satisfied on the basis of its examination of all the evidence that the remaining four criteria have been met. Therefore the Board is satisfied that West York and Bau are corporations carrying on associated or related activities or businesses under common direction or control. In this case then, the statutory pre-conditions for the application of section 1(4) have been met. However, as has been stated by the Board in a number of other cases (see for example, *H. Allaire and Sons Company Limited* [1974] OLRB Rep. July 457) its authority to treat two corporations as constituting one employer is discretionary and the Board decides whether or not to exercise this discretion on the basis of the particular facts before it. In this case, the Board finds the following facts to be relevant.

5. West York was incorporated May 23, 1967 and is a general contractor active in the industrial, commercial and institutional sector as well as the residential sector of the construction industry. Bau was incorporated May 4, 1973 and its articles of incorporation express the same objectives as West York. Bau was inactive until approximately the latter part of May, 1978 and the current business objectives which its owners have for it are to perform as a general contractor for small commercial renovations.

6. West York hires employees directly and when it does so its job sites supervisors obtain employees from the hiring halls of the appropriate building trades union. Its usual relationship with the sub-trades is to let work under sub-contracts. On the other hand, Bau has not hired any persons who are employees within the meaning of the Act up to the date of this application.

7. Bau became active for the first time when it employed Mr. S. Pesniak to solicit and execute commercial renovation contracts. In spite of its owners currently stated business objectives, its first commercial activity was in connection with building industrial condominium units on a property on Turbine Drive in North York. This property is owned jointly and equally by Mr. Kunst and Mr. Robert Pape and is registered jointly in their

names. Mr. Pape is Mr. Kunst's equal partner in the ownership of the two respondents as well.

8. It is the respondents' evidence that Messrs. Kunst and Pape are acting as their own general contractors and are using the facilities of the respondents' offices and staffs, including Mr. Pesniak who is the jobsite supervisor on the project, to aid them in executing and managing the total project. Mr. Kunst approves all sub-contracts which are let for the project and, in fact, approved one let through Bau which is referred to hereunder. Bau's role in connection with the construction activities on this project is not entirely clear from the evidence, but, in the least, it was that of a sub-contractor. A sign advertising the units for sale bears the name Bau Canada Limited. Mr. Pesniak, an employee of Bau, acted as site supervisor and was responsible for all work performed on the site. The evidence is that Bau had no employees of its own on the project other than Mr. Pesniak. The sub-contract for supplying and installing the masonry on the project was let to a contractor, M. Gasparetto by Bau. This contract has to all appearances been completed. West York was engaged on the project for pouring the foundation footings. It did so using its own employees who were transferred for the purpose from other jobsites. They were paid by West York on its payroll, out of its payroll account and by cheques bearing its name. The only other service performed by West York that is in evidence is that it was the applicant for the building permit for the project and the permit was issued in its name.

9. The Board, when deciding the exercise of its discretion in any particular fact situation, must have regard for the purpose of section 1(4) in the scheme of the Act. That purpose, stated generally, is to protect against the frustration of bargaining rights which have already been earned by a trade union, or the frustration of a trade union's efforts to gain them and to prevent the undue fragmentation of bargaining rights. For a more detailed statement of the purpose see paragraphs 9 - 13 inclusive in re: *Industrial Mine Installations Limited* [1972] OLRB Rep. October 1029. In seeing that the purpose of the section is properly realized, the Board is concerned with several questions.

- a) Is the applicant attempting to disturb existing bargaining rights?
- b) Is the applicant attempting to circumvent the normal process of certification by means of section 1(4)?
- c) Are there employees whose rights under the Act to choose their own bargaining agent would be interfered with?
- d) Has the applicant come within a reasonable period of time of becoming aware that the two respondents are closely associated in their business?

10. The facts in this case are quite clear. There are existing bargaining rights belonging to employees of West York. Bau, however, has no employees, therefore there would be no disturbance of existing bargaining rights. Since there are no employees in Bau, it may be said that there is no attempt to circumvent the normal process of certification, except possibly in respect to any future employees of Bau. It is obvious that there are no present employees whose rights to the selection of a bargaining agent are being jeopardized. The applicant has come forward immediately upon gaining sufficient knowledge of the business relationship of the two respondents.

11. The Board has some concern about the consequences of granting bargaining rights by means of a section 1(4) declaration in a situation where there are no employees in one of the related companies. However, having regard for one purpose of section 1(4) (the protection against the frustration of bargaining rights already earned by a trade union) the Board is concerned that its refusal to grant a section 1(4) declaration in the instant case would leave open to frustration the existing bargaining rights with respect to West York employees. If Bau were to be used to take the same kind of jobs as West York has been doing and then to sub-contract them to contractors other than those permitted by the collective agreement binding West York, then the result would be a circumvention of existing bargaining rights.

12. The Board determines that the particular circumstances of this application make it an appropriate situation in which to find that there is one employer for the purposes of the Act and to exercise its discretionary power permitted under section 1(4).

13. Therefore the Board finds that both respondents are bound by the Provincial Agreement and by the Work Agreement with The Toronto Building and Construction Trades Council.

0899-78-M Windsor Tube & Metal Inc., (Employer), v. United Automobile Workers Local 195, (Trade Union).

Reference – Collective Agreement – Memorandum of settlement subject to ratification subsequently ratified by union vote and employer conduct – Agreement held binding.

BEFORE: Donald D. Carter, Chairman, and Board Members D. B. Archer and E. C. Went.

APPEARANCES: *Ronald L. Cook for the employer; L. A. MacLean, Frank Quinlan and Jerry Dias for the trade union.*

DECISION OF THE BOARD: September 22, 1978.

1. This is a reference under section 96 of the *Labour Relations Act*. The question referred to the Board by the Minister is whether he has authority under section 37(4) of the Act to appoint an arbitrator.

2. The issue here is quite simply whether there exists a collective agreement between the employer and the trade union, giving rise to the right to have all differences arising out of that agreement resolved through the process of grievance arbitration. The employer submitted that the memorandum of settlement reached by the parties following negotiations was not unconditional, but depended upon the employer being able to obtain the sickness and accident plan referred to in the memorandum at an affordable price from an insurance carrier. Since this condition had not been satisfied, according to the employer, it could not be said that there existed any collective agreement. Alternatively, the employer argued that,

if there existed a collective agreement, the provision of the sickness and accident plan set out in the memorandum of settlement would place an undue hardship upon the respondent and might lead to the closure of its operation in Windsor.

3. The evidence indicated that the employer and the trade union met and bargained on a number of occasions in the fall of 1977. These meetings culminated in the signing of a memorandum of settlement by representatives of the trade union and the employer on December 8, 1977. This memorandum, bearing the names of the employer and the trade union, stated by way of preamble:

“The undersigned representatives of both the Company and the Union agree to the following basis of settlement of all matters in dispute as witnessed by the undersigned Conciliation Officer of the Ministry of Labour and agree to recommend its acceptance unanimously to their principals for ratification.”

4. Following this preamble the term of the collective agreement was set out. The memorandum next stated that “all matters previously settled and agreed to by the parties prior to conciliation shall be incorporated; attached as appendix “A”. Appendix “A” was identified as the employer’s proposals as modified by the parties during bargaining, and supplemented by additional contract language agreed to by the parties. This appendix dealt in detail with a wide range of matters usually found in collective agreements, including a grievance and arbitration procedure. Monetary benefits, however, were largely set out in the memorandum of settlement itself, which dealt with wages (including a COLA provision), shift premiums, paid holidays, OHIP, life insurance, sickness and accident insurance, vision care, a drug plan, and bereavement leave. With respect to the sickness and accident plan, the memorandum simply stated “\$110 per week – Formula 1-1-4-52. 1st month following approval by Insurance Carrier.”

5. The evidence before the Board was that the union held a ratification vote on December 15, 1977, and the memorandum of settlement was ratified by a vote of 11 to 10. Immediately following the ratification vote a representative of the employer was advised by the union, in a telephone conversation, of the results of the vote. The evidence indicated that the employees returned to work and that the employer, following the return to work, did not disavow the memorandum of settlement.

6. In fact, the evidence indicated that the employer’s actions were consistent with there being a collective agreement in existence. In December of 1977, a dispute relating to holiday pay was resolved in a manner consistent with the terms of the memorandum of settlement. In 1978, certain grievances were filed by the union and the employer did not at that time claim that there was no collective agreement. The employer, on the other hand, did refuse to sign a formal document containing contract language for all matters agreed to in the memorandum of settlement when it was presented to it in the spring of 1978. The reason given for the refusal to sign, however, was that the employer could not afford the sickness and accident plan as set out in the memorandum of settlement. At that time the employer’s president simply indicated his desire to renegotiate that particular matter, and did not expressly dispute the existence of a binding collective agreement.

7. When does a signed memorandum of settlement constitute a collective agree-

ment? In *Graphic Centre (Ontario) Inc.* [1976] OLRB Rep. May 221, the Board made it clear that "a collective agreement need not be a single formally executed document but may by proper reference incorporate any number of other documents". Where negotiations produce something less than a single formal executed document, however, the Board before finding a collective agreement must be satisfied that the negotiations have concluded in agreement between the parties and that the parties have sufficiently identified this agreement by reducing it into written form. See *Ferranti-Packard Limited*, [1977] OLRB Rep. Mar. 169. It remains to be decided whether these criteria have been made in the circumstances of this particular case.

8. The thrust of the employer's argument was that no agreement had been reached because any agreement was to be conditional upon the employer being able to obtain an affordable sickness and accident plan. The evidence introduced by the union, and left un rebutted by the employer, does not support this conclusion. The language setting out the sickness and accident plan, moreover, does not advance this argument any further. Even if this language might be construed as imposing a conditional obligation, the language does not in any way indicate that the existence of the collective agreement is dependent upon the satisfaction of the condition that the sickness and accident plan be affordable to the employer. At best this language merely supports an argument that the obligation, but not the agreement, is conditional in nature. Whether the obligation is conditional, of course, is a matter for the arbitrator to decide according to the procedure for grievance arbitration set out in the collective agreement.

9. Our conclusion is that on December 8, 1977, the union and the employer reached an agreement conditional only upon ratification by both parties. This agreement was sufficiently identified in writing by the memorandum of settlement, and the documents referred to in that memorandum of settlement. While there was no written ratification, the conduct of both parties clearly indicated that each of them was living under that agreement. The Board, therefore, is satisfied that there is sufficient evidence to support the inference that both parties have ratified the agreement, and that there now exists a collective agreement between them.

10. Some comment should be made concerning the position taken by the employer at the hearing. What the employer appeared to be saying was that it could not afford the sickness and accident plan agreed to earlier, and that it might have to close its operations if forced to provide the sickness and accident plan. While the Board recognizes that there are situations where practical economics dictate some renegotiation of benefits previously agreed to, as a matter of law, it is quite clear that the union is entitled in this case to have recourse to grievance arbitration. The right to grievance arbitration, however, need not preclude renegotiation of the collective agreement if the parties consider this alternative to be in their best interests.

11. The Minister, therefore, is advised that, since a collective agreement now exists between the parties, he does have authority to appoint an arbitrator.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1978

BARGAINING AGENTS CERTIFIED DURING AUGUST

No Vote Conducted

1671-77-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Alwell Forming Limited (Respondent) v. T.E.L. Council of Trade Unions (Intervener #1) v. International Union of Operating Engineers, Local 793 (Intervener #2).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the foregoing*).

1995-77-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Valley Bottling of Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Renfrew, Ontario, save and except supervisors, persons above the rank of supervisor, head shipper, production manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (50 employees in the unit). (*Having regard to the agreement of the parties*).

0182-78-R: Hotel and Club Employees' Union, Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Orangeroot Canada Ltd., operating as Howard Johnsons' Hotel and Restaurant at 801 Dixon Road, Rexdale, Ontario (Respondent).

Unit #1: "all employees of the respondent operating the Howard Johnsons' Hotel and Restaurant at 801 Dixon Road, Rexdale, Ontario, save and except Manager, Assistant Manager, Chef, Assistant Executive Housekeeper, Executive Housekeeper, Bar Manager, supervisors, persons above the rank of supervisor, office staff, sales staff, accounting staff, secretaries, security staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (114 employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week operating the Howard Johnsons' Hotel and Restaurant at 801 Dixon Road, Rexdale, Ontario, save and except Manager, Assistant Manager, Chef, Assistant Executive Housekeeper, Bar Manager, supervisors, persons above the rank of supervisor, office staff, sales staff, accounting staff, secretaries and security staff." (75 employees in the unit). (*Dismissed*).

(*Bargaining Unit #3 – See Application Certified Subsequent to Post-Hearing Vote*).

0322-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Briarcrest Manor (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at Briarcrest Manor, 263-265 Dixon Road in Metropolitan Toronto, including resident superintendents, save and except property supervisors, persons above the rank of property supervisor, office and clerical staff and students employed during the school vacation period.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0357-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions 785, 1316, 1617, and 2041 (Applicant) v. Quick Drywall Limited (Respondent) v. Wood, Wire and Metal Lathers’ International Union, Local 562 (Intervener).

Unit: “all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by a subsisting collective agreement between the respondent and the Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local 48, effective from May 1, 1978, until April 30, 1980.” (2 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. August).

0385-78-R: Teamsters, Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Margaret’s Fine Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: “all employees of the respondent working at Metropolitan Toronto, save and except forepersons, those above the rank of forepersons, retail clerks and waitresses employed in the restaurant, office and sales representative staff, drivers, driver salesmen, garage employees, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.” (143 employees in the unit). (*Having regard to the agreement of the parties*).

(*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

0418-78-R: International Woodworkers of America (Applicant) v. Abitibi Containers Division of Abitibi Paper Company Limited (Respondent).

Unit: “all office and clerical employees of the respondent at its plant in Pembroke, Ontario, save and except supervisors, foremen, persons above the rank of supervisor or foreman, salesmen, security guards, industrial engineering personnel, professional engineers, secretary to the manager, personnel and industrial relations assistant, planning supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a cooperative training basis, with a college or university, and persons represented for collective bargaining purposes under the subsisting collective agreement between the respondent and International Woodworkers of America, Local 2 – 1000.” (33 employees in the unit). (*Having regard to the agreement of the parties*).

0528-78-R: Canadian Union of Public Employees (Applicant) v. Kingston Public Library (Respondent).

Unit: “all employees of the respondent in the city of Kingston, Ontario, save and except co-ordinators, those above the rank of co-ordinator, secretary to the chief librarian, bookkeeper, library pages, and members of the Canadian Corps of Commissionaires Inc.” (57 employees in the unit). (*Having regard to the agreement of the parties*).

0571-78-R: Canadian Union of Public Employees (Applicant) v. St. Joseph's Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all lay office and clerical employees of St. Joseph's Hospital, Guelph, save and except supervisors, persons above the rank of supervisor, Accountant, Senior Payroll Clerk, Dispatch Co-ordinator, the secretary to the Executive Director (Administrator – St. Joseph's Home for the Aged), the secretary to the assistant Executive Director, the secretary to the Director of Finance, (Assistant Administrator – St. Joseph's Home for the Aged), the secretary to the Director of Patient Services, the secretary of the Personnel Manager, the secretary to the Director of Food and Nutrition Services, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and persons covered by subsisting collective agreements." (67 employees in the unit). (*Having regard to the agreement of the parties*).

0634-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. G & D Contracting (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0676-78-R: International Federation of Professional and Technical Engineers, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Allen-Bradley Canada Limited (Respondent).

Unit: "all draftsmen and apprentice draftsmen employed by the respondent in the Regional Municipality of Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, instructors, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. August).

0677-78-R: Hotel & Motel and Restaurant Employees Union, Local 893, Atikokan, Ontario, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Parkmount Restaurant & Bus Depot (Respondent).

Unit #1: "all employees of the Parkmount Restaurant & Bus Depot at Atikokan, Ontario, save and except manager, assistant manager, ticket agents, persons regularly employed for not more than 24 hours per week, and students employed during school vacation period." (5 employees in the unit).

Unit #2: "all employees of the Parkmount Restaurant & Bus Depot at Atikokan, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except manager, assistant manager, and ticket agents." (3 employees in the Unit).

0681-78-R: Teamsters, Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Brinks Canada Limited (Respondent).

Unit #1: "all employees of the respondent at Toronto, save and except supervisors, persons above the rank of supervisors, office and sales staff, employees covered by a subsisting collective agreement, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (26 employees in the unit). (*Certified*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week, students employed for the school vacation period save and except employees covered in Unit 1, supervisors, persons above the rank of supervisors, office and sales staff, employees covered by a subsisting collective agreement." (17 employees in the unit). (*Dismissed*).

0683-78-R: Canadian Union of Public Employees (Applicant) v. Ontario Humane Society (Respondent).

Unit: "all employees of the respondent in the City of Thunder Bay, Ontario, save and except the supervisor and persons above the rank of supervisor." (7 employees in the unit).

0692-78-R: Pharmacists and Professional Employees Association, Local Union 1976; chartered by the Retail Clerks International Union, CLC-AFL-CIO (Applicant) v. Cedarcrest Nursing Home Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (19 employees in the unit).

0693-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Westburne Industrial Enterprises Limited Division – Palmers Plumbing Supply (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (18 employees in the unit).

0700-78-R: Canadian Union of Public Employees (Applicant) v. St. Peter's Hospital (Respondent).

Unit #1: "all office and clerical employees, including Leisure Activity Assistants, of the respondent at Hamilton, Ontario, save and except persons covered by existing collective agreements, technical and professional medical staff, supervisors, persons above the rank of supervisor, secretary to the executive director, secretary to the medical director and personnel assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees, including Leisure Activity Assistants, of the respondent at Hamilton, Ontario who are regularly employed for not more than 24 hours per week or who are students employed during the school vacation period, save and except persons covered by existing collective agreements, technical and professional medical staff, supervisors, persons above the rank of supervisor, secretary to the executive director, secretary to the medical director and personnel assistant." (3 employees in the unit).

0702-78-R: United Steelworkers of America (Applicant) v. Lite Tech Industries Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, students employed during the school vacation periods, office and sales staff." (30 employees in the unit). (*Having regard to the agreement of the parties*).

0728-78-R: Retail Clerks Union, Local 409 (Applicant) v. Bilrite Lumber and Supply Limited (Respondent) v. Lumber & Sawmill Workers Union (Intervener).

Unit: "all employees of the respondent at its retail store in County Fair Plaza, Thunder Bay, save and except Store Manager, Assistant Store Manager, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between Lumber & Sawmill Workers Union, Local 2693

and the respondent company.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

0729-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America A.F.L.-C.I.O.-C.L.C. (Applicant) v. Canadian Home Products Limited (Respondent).

Unit: “all quality control employees employed by the respondent at Niagara Falls, Ontario, save and except quality control supervisor.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

0730-78-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Rockville Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0736-78-R: International Molders & Allied Workers Union (Applicant) v. Dart Foundries Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Stevensville, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (27 employees in the unit).

0743-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Controlled Systems (Windsor) Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (41 employees in the unit). (*Having regard to the agreement of the parties*).

0744-78-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Manacon Construction (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

0750-78-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Ellis-Don Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

0755-78-R: London and District Service Workers’ Union, Local 220, S.E.I.U.-A.F.L.-C.I.O.-C.L.C. (Applicant) v. Extendicare Ltd. (Respondent).

Unit: "all employees of the respondent in Port Stanley, regularly employed for not more than 22½ hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and employees covered under subsisting collective agreements." (22 employees in the unit). (*Having regard to the agreement of the parties*).

0758-78-R: Canadian Union of Public Employees (Applicant) v. Vanier Public Library (Bibliothèque Publique De Vanier) (Respondent).

Unit: "all employees of the respondent in Vanier, save and except Head Librarians, persons above the rank of Head Librarian, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in the unit).

0763-78-R: Local Union 120, International Brotherhood of Electrical Workers (Applicant) v. Hosack and Matthews Ltd. (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0768-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Crush Bottling Company (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Windsor and Essex, Ontario, save and except office staff, sales supervisors, foremen, persons above the rank of sales supervisor and foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (15 employees in the unit).

0778-78-R: Christian Labour Association of Canada (Applicant) v. Rudco Insulation Ltd. (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0786-78-R: United Steelworkers of America (Applicant) v. Erco Industries Limited (Respondent).

Unit: "all office, clerical and technical employees of the respondent at its plant in Port Maitland, save and except supervisors, persons above the rank of supervisor and one secretary to the manager." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0788-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Howell Forwarding Company Limited (Respondent).

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office and sales staff, persons who do not regularly work more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in the unit). (*Having regard to the agreement of the parties*).

0802-78-R: United Steelworkers of America (Applicant) v. Sandvik Conveyor Canada Limited (Respondent).

Unit: "all employees of the respondent employed at Guelph, save and except foremen and field supervisors, persons above the rank of foreman and field supervisor, draftsman, purchasing agent, office and sales staff." (15 employees in the unit). (*Having regard to the agreement of the parties*).

0812-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Kirkwood Commutators (Canada) Limited (Respondent).

Unit: "all employees of the respondent in Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (38 employees in the unit). (*Having regard to the agreement of the parties*).

0822-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Brewers' Warehousing Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all telephone order clerks employed by the respondent in its telephone order office at 1015 Lakeshore Blvd. East, Toronto, save and except supervisors, office managers, persons above the rank of supervisor or office manager, and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

0824-78-R: United Brotherhood of Carpenters & Joiners of America A.F.L.-C.I.O.-C.L.C. (Applicant) v. George Wimpey Canada Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

0833-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Wesco Excavating & Contracting (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0835-78-R: Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351 (Applicant) v. Ella Skinner Uniforms Ltd. (Respondent).

Unit: "all employees of the respondent at its plant in Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (49 employees in the unit).

0845-78-R: Christian Labour Association of Canada (Applicant) v. Acme Industries (1978) Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and

the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

0850-78-R: Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Levi Strauss of Canada, Inc. (Respondent).

Unit: “all employees of the respondent located at 90 Clairville Road, Rexdale, Ontario M9W 5Y1, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, maintenance staff, quality auditors, warehouse clerical, sales, data processing and office staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period.” (28 employees in the unit). (*Having regard to the agreement of the parties*).

0851-78-R: Canadian Union of Public Employees (Applicant) v. C.O.S.T.I. Italian Community Promotion Centre (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, secretary to the executive director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (29 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision (1978) OLRB Rep. August*).

0852-78-R: International Association of Machinists & Aerospace Workers, District Lodge 717 (Applicant) v. Western Propeller (Atlantic) Ltd. (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Peel, save and except foremen and persons above the rank of foreman, office and sales staff.” (13 employees in the unit).

0862-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. George Wimpey Canada Limited (Respondent).

Unit: “all employees of George Wimpey Canada Limited working at the employer’s shop and yard at 80 North Queen Street, Toronto, Ontario, save and except non-working foremen and those above the rank of non-working foreman, office, clerical and sales staff and those employees covered by a collective agreement with Teamsters, Local 230 and those covered by subsisting agreements with the International Union of Operating Engineers, Local 793.” (12 employees in the unit). (*Having regard to the agreement of the parties*).

0868-78-R: Labourers’ International Union of North America, Local Union 183 (Applicant) v. Gables Precision Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0876-78-R: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Baker Investments Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1195-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. Piersanti Plastering Company Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener).

Unit: "all plasterers and plasterers' apprentices employed by the respondent on residential building projects in and out of the City of Hamilton, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots		7
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener	1	

0392-78-R: United Steelworkers of America (Applicant) v. Eastern Steelcasting Division of Sivaco Wire and Nail Company (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener).

Unit: "all employees of the respondent at its plant in L'Original, Ontario save and except foremen, persons above the rank of foremen, office and clerical staff, sales staff, security guards, quality control inspectors, laboratory technicians, students employed during the school vacation period, persons regularly employed for not more than twenty-four (24) hours per week, and university personnel in training." (199 employees in the unit).

Number of names of persons on revised voters' list		196
Number of persons who cast ballots		183
Number of ballots marked in favour of applicant	177	
Number of ballots marked in favour of intervener	6	

0560-78-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cusa Creations Limited (Respondent).

Unit: "all employees of the respondent working at Cornwall, Ontario save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff." (70 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		62
Number of persons who cast ballots		62
Number of ballots marked in favour of applicant	34	
Number of ballots marked against applicant	28	

0640-78-R: United Electrical and Machine Workers of America (UE) (Applicant) v. Genstar Chemical Limited (Respondent).

Unit: "all employees of the respondent at its plant in the City of Welland, save and except foremen, persons above the rank of foreman, office and sales staff." (11 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	0	

0659-78-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Westcane Sugar Limited (Respondent) v. Bakery & Confectionery Workers International Union, Local 264 (Intervener).

Unit: "all employees of the respondent at its Oshawa, Ontario plant, save and except foremen and foreladies, persons above the rank of foreman, and forelady, office and sales staff, sugar boilers, security guards, stationary engineers, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (89 employees in the unit).

Number of names of persons on revised voters' list		84
Number of persons who cast ballots	79	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	59	
Number of ballots marked in favour of intervener	18	

Applications Certified Subsequent to Post-Hearing Vote

0182-78-R: Hotel and Club Employees' Union Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Orangeroo Canada Ltd., operating as Howard Johnsons' Hotel and Restaurant at 801 Dixon Road, Rexdale, Ontario (Respondent).

Unit #3: "all front desk office staff and switchboard operators employed by the respondent at the Howard Johnsons' Hotel and Restaurant at 801 Dixon Road, Rexdale, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (7 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	0	

(Bargaining Unit #1 & #2 – See Bargaining Units Certified – No Vote Conducted).

0311-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Riverside Roofing Limited (Respondent) v. Sheet Metal Workers' International Association, Local Union 235 (Intervener).

Unit: "all built-up roofing employees of the respondent employed in the Counties of Essex and Kent, save and except foremen, persons above the rank of foreman and office staff." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer			5
Number of persons who cast ballots		5	
Number of ballots marked in favour of applicant	4		
Number of ballots marked in favour of intervener	1		

0332-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Malen Steel and Salvage Company Limited (Respondent) v. Labourers' International Union of North America, Local 625 (Intervener).

Unit: "all construction labourers in the employ of the respondent in the County of Essex and Kent, save and except construction labourers employed in the industrial, commercial and institutional sector of the construction industry, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Number of names of persons on list as originally prepared by employer			4
Number of persons who cast ballots		4	
Number of ballots marked in favour of applicant	4		
Number of ballots marked in favour of intervener	0		

0385-78-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Margaret's Fine Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit #2: "all drivers, driver salesmen and garage employees of the respondent working at and out of Metropolitan Toronto, save and except forepersons, those above the rank of foreperson, retail clerks and waitresses employed in the restaurant, office and sales representative staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (16 employees in the unit).

Number of names of persons on list as originally prepared by employer			19
Number of persons who cast ballots		16	
Number of ballots marked in favour of applicant	12		
Number of ballots marked against applicant	4		

(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).

0389-78-R: Service Employees Union, Local 204, Affiliated with A.F.L.-C.I.O.-C.L.C. (Applicant) v. St. Raphael's Nursing Homes Limited carrying on business under the firm name and style of St. Raphael's Nursing Home (McNicoll) (Respondent).

Unit: "all employees of St. Raphael's Nursing Home in Scarborough save and except professional medical staff, registered nurses, graduate nurses and undergraduate nurses, physiotherapists, occupational therapists, Director of activities, Supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (115 employees in the unit).

Number of names of persons on revised voters' list			99
Number of persons who cast ballots		89	
Number of ballots marked in favour of applicant	82		
Number of ballots marked against applicant	7		

0592-78-R: International Ladies' Garment Workers' Union (Applicant) v. Pandella Fashions Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, shippers, designers, mechanics, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (104 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		104
Number of persons who cast ballots	93	
Ballots segregated and not counted	4	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	48	
Number of ballots marked against applicant	40	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1729-76-R: Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lackie Bros. Limited (Respondent) v. Shopmen's Local Union No. 734 of International Association of Bridge, Structural & Ornamental Iron Workers (Intervener). (40 employees).

0691-77-R: Labourers International Union of North America, Local 506 (Applicant) v. Ontario Motor League – Toronto Club (Respondent). (31 employees).

1842-77-R: United Steelworkers of America (Applicant) v. Caisse Populaire De Chelmsford Ltee. (Respondent) v. Group of Employees (Objectors). (8 employees).

1965-77-R: Chatham Construction Workers Association, Local #53, affiliated with the Christian Labour Association of Canada (Applicant) v. Kent Acoustic Lathing & Drywall Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local #494 (Intervener) v. Group of Employees (Objectors). (5 employees).

0415-78-R: The Employees' Association of Carefree Lodge (Applicant) v. Carefree Lodge (Respondent) v. The Canadian Union of Public Employees (Intervener). (33 employees).

0422-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Cooper Construction Company Limited (Respondent) v. Local 298 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener). (2 employees).

0595-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. Relmech Manufacturing Limited (Respondent) v. Group of Employees (Objectors). (27 employees).

0597-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Teal Painters Limited (Respondent). (6 employees).

0682-78-R: Canadian Union of Public Employees (Applicant) v. Young Men's and Young Women's Hebrew Association (Respondent). (94 employees).

0704-78-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Erie & Huron Beverages Limited (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Intervener) v. Group of Employees (Objectors). (19 employees).

0773-78-R: The Central of Independent Union of the Automobile Industry (Applicant) v. Canpark Services Ltd. (Respondent). (22 employees).

0774-78-R: The Central of Independent Unions of the Automobile Industry (Applicant) v. Canpark Services Ltd. (Respondent). (58 employees).

0857-78-R: Canadian Union of Public Employees (Applicant) v. Campbellford Memorial Hospital (Respondent). (85 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0068-78-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens (Oxford) Inc. (Respondent) v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L.-C.I.O.-C.L.C. (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its nursing home at London, save and except supervisors, persons above the rank of supervisor, office staff, registered and graduate nurses, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (73 employees in the unit).

Number of names of persons on revised voters' list		70
Number of persons who cast ballots		62
Number of ballots segregated and not counted	2	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	6	
Number of ballots marked in favour of intervener	53	

Certification Dismissed Subsequent to Post-Hearing Vote

1120-77-R: Raymond Albert Lambert (Applicant) v. Ottawa Newspaper Guild, Local 205 (Respondent) v. The Journal Publishing Company of Ottawa, Limited (Intervener).

Unit: "all employees of The Journal Publishing Company of Ottawa, Limited in the Circulation Department of Publisher save and except the Circulation Manager, Assistant Circulation Manager, secretary to the Circulation Manager, employees hired to work regularly for 24 hours or less per week, temporary employees employed on a special project for a limited time, or a student employed during his vacation." (85 employees in the unit).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots	49	
Number of spoiled ballots	2	
Number of ballots marked in favour of Respondent	24	
Number of ballots marked against Respondent	23	

1683-77-R: United Steelworkers of America (Applicant) v. Trent Metals Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and persons engaged as trainees under the Canada Manpower Industrial Training Program." (55 employees in the unit).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	22	

0530-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Varamae Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of Varamae Construction Limited in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	2	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0649-78-R: International Ladies' Garment Workers' Union (Applicant) v. Italo International Fashions Ltd. (Respondent) v. Employees (Objectors). (6 employees).

0698-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sheridan College of Applied Arts and Technology (Respondent). (3 employees).

0720-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Robert McAlpine Limited (Respondent). (4 employees).

0732-78-R: Ontario Public Service Employees Union (Applicant) v. Windsor Western Hospital (Respondent). (114 employees).

0815-78-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Triomphe Inc. carrying on business as Glossop's Restaurant (Respondent). (7 employees).

0841-78-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. York Condominium Corporation No. 76 (Respondent) v. The Labourers' International Union of North America, Local 183 (Intervener). (37 employees).

0858-78-R: Canadian Union of Public Employees (Applicant) v. University of Toronto Library (Respondent). (86 employees).

0869-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Waynco Limited (Respondent). (4 employees).

APPLICATION UNDER SECTION 1(4)

1919-77-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 (Applicant) v. Neath Restoration and Consultants Limited, Neath Toronto Limited, Neath & Associates Limited (Respondents). (*Withdrawn*).

APPLICATIONS UNDER SECTION 4 OF THE SUCCESSOR RIGHTS (CROWN TRANSFERS) ACT, 1977

1980-77-R: Owen Sound General and Marine Hospital (Applicant) v. Ontario Public Service Employees Union; Canadian Union of Public Employees, Local 48; and Ontario Nurses' Association and its Local 147 (Respondents).

- and -

0036-78-R: Canadian Union of Public Employees Local 48 (Applicant) v. Owen Sound General and Marine Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener #1) v. Ontario Nurses' Association (Intervener #2).

Unit #1: "all employees of the Owen Sound General and Marine Hospital, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, school students, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, medical social workers, clerical workers, ward clerks and persons regularly employed for not more than twenty-four hours per week." (298 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. August).

Number of names of persons on revised voters' list	298
Number of persons who cast ballots	284
Number of ballots marked in favour of Canadian Union of Public Employees, Local 48	160
Number of ballots marked in favour of The Ontario Public Service Employees Union	124

Unit #2: "all employees of the Owen Sound General and Marine Hospital regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons

above the rank of supervisor, chief engineer, medical social workers, clerical workers, ward clerks.” (81 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. August).

Number of names of persons on revised voters' list		81
Number of persons who cast ballots		50
Number of spoiled ballots	2	
Number of ballots marked in favour of Ontario Public Service Employees Union	25	
Number of ballots marked against Ontario Public Service Employees	23	

Unit #3: “all full-time registered and graduate nurses engaged in nursing care in the Owen Sound General and Marine Hospital, save and except Head Nurses and persons above the rank of Head Nurse.” (175 employees in the unit).

Number of names of persons on revised voters' list		175
Number of persons who cast ballots		166
Number of spoiled ballots	1	
Number of ballots marked in favour of Ontario Nurses' Association	139	
Number of ballots marked in favour of Ontario Public Service Employees Union	26	

Unit #4: “all registered and graduate nurses engaged in nursing care in the Owen Sound General and Marine Hospital who work less than five hours per week on a regular basis, save and except Head Nurses and persons above the rank of Head Nurse.” (124 employees in the unit).

Number of names of persons on revised voters' list		124
Number of persons who cast ballots		87
Ballots segregated and not counted	2	
Number of ballots marked in favour of Ontario Nurses' Association, Local 147	79	
Number of ballots marked in favour of Ontario Public Service Employees Union	6	

Unit #5: “all paramedical employees of the hospital, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (50 employees in the unit).

Number of names of persons on revised voters' list		50
Number of persons who cast ballots		49
Number of ballots marked in favour of Ontario Public Service Employees Union	22	
Number of ballots marked against Ontario Public Service Employees Union	27	

Unit #6: “all paramedical employees of the hospital regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations.” (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	9	
Number of ballots marked in favour of Ontario Public Service Employees Union	1	
Number of ballots marked against Ontario Public Service Employees Union	8	

Unit #7: "all office and clerical employees of the hospital, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (54 employees in the unit).

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	49	
Number of ballots marked in favour of Ontario Public Service Employees Union	35	
Number of ballots marked against Ontario Public Service Employees Union	14	

Unit #8: "all office and clerical employees of the hospital regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations." (27 employees in the unit).

Number of names of persons on revised voters' list		27
Number of persons who cast ballots	21	
Number of spoiled ballots	0	
Number of ballots marked in favour of Ontario Public Service Employees Union	10	
Number of ballots marked against applicant Ontario Public Service Employees Union	11	

0520-78-R: Ontario Public Services Employees Union (Applicant) v. Beechgrove Regional Children's Centre (Respondent). (48 employees). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0146-78-R: John Looyenga (Applicant) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union No. 172 (Restoration Steeplejacks) (Respondent) v. Neath Restoration & Consultants Limited (Intervener). (*Granted*).

Unit: "all employees of Neath Restoration & Consultants Limited in the Province of Ontario, save and except those above the rank of working foremen." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	22	
Number of spoiled ballots	1	
Number of ballots marked in favour of Respondent	8	
Number of ballots marked against Respondent	13	

0195-78-R: Carm Cardinal (Applicant) v. IBEW Local 115 (Respondent). (*Granted*).

Unit: "all employees of Elco Electric Ltd. in the Counties of Prince Edward, Hastings, Lennox and Addington, Frontenac, Leeds, Grenville, Dundas, Stormont and Glengarry engaged in: *Outside Work* All work necessary to the assembling, installation, erection, operation, maintenance, repair, control, inspection, and supervision of all electrical apparatus, devices, wires, cables, supports, insulators, conductors, ducts and raceways when part of distributing systems outside of buildings, railroads and outside the directly related railroad property and yards. Installing and maintaining the catenary and trolley work on railroad property, and bonding of rails. All underground ducts and cables when they are installed by and are part of the system of a distributing company, except in power stations during new construction, including ducts and cables to adjacent switch racks or substations. All outdoor substations and electrical connections up to and including the setting of transformers and the connecting of secondary buses thereto. *Inside Work* All electrical signs, all street decorations when no messenger or guy wire is necessary for support. Installation, construction, inspection, operation, maintenance and repair of all electrical work in isolated plans and within property lines of any given property, and beginning at the secondary side of the transformer, except line work consisting of poles and towers, including wires or cables and other apparatus supported therefrom and except all outdoor substations as defined in Outside Work hereof, save and except foremen and those above the rank of foreman." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots		6
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	6	

0262-78-R: Carolyn Beck (Applicant) v. Teamsters, Chauffeurs, Warehousemen, and Helpers, Local 880, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (*Granted*).

Unit: "all employees of H. O. Trerice Co. at Windsor, Ontario, save and except office and sales staff, foremen and persons above the rank of foreman." (1 employee in the unit).

Number of names of persons on list as originally prepared by employer		1
Number of persons who cast ballots		1
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	1	

0378-78-R: John Bishop (Applicant) v. Labourers' International Union, Local 1267 Oil and Gas Technicians, Service, Domestic and General Workers (Respondent) v. Metal Improvement Co. Inc., Mican Division (Intervener). (*Granted*).

Unit: "all employees of Metal Improvement Co. Inc. in Metropolitan Toronto, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (28 employees in the unit).

Number of names of persons on list as originally prepared by employer		33
Number of names of persons on revised voters' list		31
Number of persons who cast ballots	20	
Number of ballots marked in favour of respondent	2	
Number of ballots marked against respondent	18	

0414-78-R: Helen Spinks (Applicant) v. Retail, Wholesale and Department Store Union, Local 414 (Respondent). (10 employees). (*Dismissed*).

0511-78-R: Shirley Lorraine Hawkins (Applicant) v. Boot and Shoe Workers' Union Canadian Labour Congress AFL-CIO (Respondent) v. Hillsdale Nursing Home (Intervener). (*Granted*).

Unit: "all employees of Hillsdale Nursing Home at Campbellford, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, persons regularly employed during the school vacation period." (25 employees in the unit).

Number of names of persons on list as originally prepared by employer		26
Number of persons on revised voters' list and at start of vote		26
Ballots segregated and not counted	2	
Number of persons who cast ballots	23	
Number of ballots marked in favour of respondent	6	
Number of ballots marked against respondent	15	

0623-78-R: Rino Beaulieu (Applicant) v. United Association of Journeyman & Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, Local 800 (Respondent). (1 employee). (*Dismissed*).

0831-78-R: R. J. Shepherd (Applicant) v. Biltrite Lumber and Supply Limited (Respondent). (no employees in S.52). (*Dismissed*).

0842-78-R: Rob Sine (Applicant) v. Hotel and Restaurant Workers Union Local 743 (Respondent). (31 employees). (*Withdrawn*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0478-78-R: Retail Clerks Union, Local 486 (Applicant) v. Canada Safeway Limited (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0737-78-U: G. M. Gest Limited (Applicant) v. Labourers' International Union of North America, Local 527 and F. Manoni, B. Carrozzi, J-P Cyr, G. Landry, G. LeBlanc, G. Berthlot, J-G Parent, N. Blais (Respondents). (*Granted*).

0880-78-U: MTD Products Limited successor to SEHL Engineering Limited (Applicant) v. Claude Boivin, et al. (Respondents). (*Withdrawn*).

0884-78-U: Sheafer-Townsend Construction Limited (Applicant) v. Robert Docherty, et al. (See Schedule "A" attached hereto) (Respondents).

0916-78-U: John Garay and Associates Limited and Merton Street Joint Venture (Applicant) v. The United Brotherhood of Carpenters and Joiners of America & The Toronto Building and Construction Trades Council & Dave Johnson & Nick Tansella & Ron Allian (Respondents). (*Withdrawn*).

0919-78-U: Ainsworth Electric Co. Limited (Applicant) v. International Brotherhood of Electrical Workers, Local Union 804, Chuck MacKenzie, et al. (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0480-78-U: Nairn Centre Sawmill Workers' Union (Applicant) v. (1) Robert Gordon, (2) Lumber and Sawmill Workers' Union Local 2693, (3) E. B. Eddy Forest Products Ltd. (Respondents). (*Dismissed*).

0818-78-U: The Organ Grinder Ltd. (Applicant) v. The Hotel & Restaurant Employees & Bartenders International Union, Local 280, Susan Ballantyne and William McAinsh (Respondents). (*Withdrawn*).

0819-78-U: Labourers' International Union of North America, Local 607 (Applicant) v. Anderson Block & Tile Ltd., Terra Krete Limited and B & B Stone Limited (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1940-76-U: Oil, Chemical, and Atomic Workers International Union, Local 9-593 (Complainant) v. International Waxes Limited (Respondent). (*Withdrawn*).

0361-77-U: Oil, Chemical and Atomic Workers International Union, Local 9-593 (Complainant) v. International Waxes Limited (Respondent). (*Withdrawn*):

1185-77-U: Service Employees' International Union (Complainant) v. Western Fair Association (Respondent). (*Dismissed*).

0483-78-U: Nairn Centre Sawmill Workers' Union (Complainant) v. (1) Robert Gordon, (2) Lumber and Sawmill Workers' Union Local 2693, (3) E. B. Eddy Forest Products Ltd. (Respondents). (*Dismissed*).

0510-78-U: Canadian Union of Public Employees (Complainant) v. Art Gallery of Ontario (Respondent). (*Withdrawn*).

0660-78-U: International Beverage Dispensers and Bartenders Union Local 280, the Hotel & Restaurant Employees Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Organ Grinder Limited known as Organ Grinder Tavern (Respondent). (*Withdrawn*).

0684-78-U: United Garment Workers of America (Complainant) v. Victory Cap and Sportswear Ltd. (Respondent). (*Withdrawn*).

0689-78-U: United Brotherhood of Carpenters & Joiners of America (Complainant) v. Danway Industries Ltd. (Respondent). (*Granted*).

0690-78-U: Pharmacists and Professional Employees Association, Local Union 1976; Chartered by the Retail Clerks International Union, CLC-AFL-CIO (Complainant) v. Green Acres Nursing Home owned and operated by Bellevilla Nursing Homes Inc. (Respondent). (*Withdrawn*).

0721-78-U: International Federation of Professional and Technical Engineers, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Allen-Bradley Canada Limited (Respondent). (*Withdrawn*).

0725-78-U: United Garment Workers of America (Complainant) v. Four B Manufacturing Limited (Respondent). (*Granted*).

0738-78-U: United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency (Complainant) v. United Brotherhood of Carpenters & Joiners of America, The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America, Local 785 of The United Brotherhood of Carpenters & Joiners of America, Steve Koehler and Orlando Construction Co. (Respondents). (*Dismissed*).

0739-78-U: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Complainant) v. Continental Iron and Steel Works (Respondent). (*Withdrawn*).

0775-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Organ Grinder Ltd., carrying on business as the Organ Grinder Tavern (Respondent). (*Withdrawn*).

0781-78-U: United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency (Complainant) v. United Brotherhood of Carpenters & Joiners of America, The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America, Local 785 of The United Brotherhood of Carpenters & Joiners of America, Steve Koehler and Losereit Sales & Services Limited (Respondents). (*Withdrawn*).

0782-78-U: Amalgamated Clothing and Textile Workers Union (Complainant) v. Filterfab Incorporated (Respondent). (*Withdrawn*).

0783-78-U: The Organ Grinder Ltd. (Complainant) v. The Hotel & Restaurant Employees and Bartenders International Union, Local 280 (Respondent). (*Withdrawn*).

0784-78-U: Labourers International Union of North America, Locals 493, 506, 527, 625, 749 and 1089 on their own behalf and on behalf of their members (Complainants) v. Ontario Provincial District Council of The Labourers International Union of North America representing affiliated local Unions of the Labourers International Union of North America, Locals 183, 247, 491, 493, 527, 597, 607, 625, 749, 837, 1036, 1059, 1981, 1089 and Michael O'Brien (Respondents). (*Withdrawn*).

0785-78-U: Labourers International Union of North America, Local 527, on behalf of itself and all its members (Complainant) v. Ontario Provincial District Council of The Labourers International Union of North America representing affiliated local Unions of the Labourers International Union of North America, Locals 183, 247, 491, 493, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and Michael O'Brien (Respondents). (*Withdrawn*).

0787-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and

Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Our Place Restaurant and Tavern (Respondent). (*Withdrawn*).

0789-78-U: Ontario Nurses' Association (Complainant) v. Little's Nursing Home (Tecumseh) Ontario (Respondent). (*Withdrawn*).

0792-78-U: Martin Horan (Complainant) v. The Canadian Brotherhood of Railway, Transport and General Workers, Local Union Number 304 (Respondent). (*Withdrawn*).

0799-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Controlled Systems (Windsor) Limited (Respondent). (*Withdrawn*).

0800-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Controlled Systems (Windsor) Limited (Respondent). (*Withdrawn*).

0813-78-U: Hotel and Club Employees' Union, Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union (Complainant) v. Orangerooft Canada Ltd., operating as Howard Johnsons' Hotel and Restaurant (Respondent). (*Withdrawn*).

0814-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Our Place Restaurant and Tavern a division of G.K.S. Restaurant Ltd. (Respondent). (*Withdrawn*).

0817-78-U: The Organ Grinder Ltd. (Complainant) v. The Hotel & Restaurant Employees & Bartenders International Union, Local 280; Susan Ballantyne & William McAlinsh (Respondents). (*Withdrawn*).

0820-78-U: Labourers' International Union of North America, Local 607 (Complainant) v. Anderson Block & Tile Ltd., Terra Krete Limited and B & B Stone Limited (Respondents). (*Withdrawn*).

0832-78-U: Ontario Nurses' Association (Complainant) v. Extendicare Ltd., North York (Respondent). (*Withdrawn*).

0837-78-U: The Canadian Union of Public Employees (Complainant) v. The Smiths Falls Community Hospital (Respondent). (*Withdrawn*).

0847-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Our Place Restaurant and Tavern a division of G.K.S. Restaurant Ltd. (Respondent). (*Withdrawn*).

0848-78-U: United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency (Complainant) v. United Brotherhood of Carpenters & Joiners of America and The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America (Respondents). (*Granted*).

APPLICATION UNDER SECTION 39

1555-77-M: Andries Van Es (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L.-C.I.O.-C.L.C., Local 487 (Respondent Trade Union) v. General Concrete Ltd. Hamilton Division (Respondent Employer).

- and -

1652-77-M: Bienze Vanderzwaag (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L.-C.I.O.-C.L.C., Local 487 (Respondent Trade Union) v. General Concrete Ltd. Hamilton Division (Respondent Employer).

- and -

1653-77-M: Arie Van Es (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L.-C.I.O.-C.L.C., Local 487 (Respondent Trade Union) v. General Concrete Ltd. Hamilton Division (Respondent Employer). (*Dismissed*).

APPLICATIONS UNDER SECTION 55

0173-78-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 (Applicant) v. Neath Restoration and Consultants Limited, Neath Toronto Limited, Neath & Associates Limited (Respondents) v. Christian Labour Association of Canada (Intervener). (*Withdrawn*).

0472-78-U: The Wood, Wire and Metal Lathers' International Union, Local 562 (Applicant) v. Spring Plastering Construction Company and Quick Drywall (Respondents) v. The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions 785, 1316, 1617, and 2041 (Intervener). (*Withdrawn*).

0594-78-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Regional Municipality of Halton (Respondent) v. Ontario Public Service Employees Union (Intervener). (*Granted*).

APPLICATION UNDER SECTION 76 (FINANCIAL STATEMENT REQUESTED BY TRADE UNION MEMBER)

0691-78-M: Ray W. Kuszelewski, Teamsters for Teamsters/TDU, P.O. Box 331 Brampton, Ontario L6V 2L3 (Complainant) v. Teamsters Union, Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1657-77-M: Ontario Public Service Employees Union (Applicant) v. St. Lawrence College of Applied Arts & Technology (Respondent). (*Withdrawn*).

1688-77-M: Canadian Union of Public Employees, Local 1115 (Applicant) v. The Corporation of the City of Welland (Respondent). (*Granted*).

1743-77-M: Canadian Union of Public Employees, Local Union 1115 (Applicant) v. The Corporation of the City of Welland (Respondent). (*Granted*).

0268-78-M: Employees (Applicant) v. York University (Respondent) v. International Union, United Plant Guard Workers of America, and Local 1962 (Respondent Union). (*Dismissed*).

0804-78-M: Service Employees' Union, Local 210 (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario operating St. Joseph's Hospital (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112A

0102-77-M: Labourers' International Union of North America, Ontario Provincial District Council on behalf of Local 837 (Applicant) v. Lincoln Mechanical Contractors (Respondent). (*Withdrawn*).

1405-77-M: Trenton Construction Workers Association, Local No. 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Wm. Finkle Machine Limited (Respondent). (*Withdrawn*).

0089-78-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. The Masonry Industry Employers' Council of Ontario and McMillan & Stemmler Limited, also carrying on business as McMillan & Stemmler Masonry Contractor (Respondent). (*Withdrawn*).

0142-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Danhei Construction Limited (Respondents). (*Withdrawn*).

0504-78-M: Wood, Wire and Metal Lathers' International Union Local 562 (Applicant) v. The Interior Systems Contractors' Association of Ontario, Spring Plastering Construction Company and Quick Drywall (Respondents). (*Withdrawn*).

0624-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Parkburn Construction Ltd. (Respondent). (*Withdrawn*).

0697-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; and Local 853 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicants) v. The Canadian Automatic Sprinkler Association and Duncan Reynolds Ltd. (Respondents). (*Withdrawn*).

0705-78-M: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. R. E. Van Gassen Limited (Respondent). (*Withdrawn*).

0713-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. (1) Lamparter Mechanical Contractors Ltd. (2) and The Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

0714-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Globo Plumbing Ltd. and The Metropolitan Plumbing and Heating Contractors Association, A Division of the Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

0749-78-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local No. 598 (Applicant) v. Capital Construction (Respondent).

0762-78-M: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Electrical Contractors Association of Toronto and Northway Electric Company Limited (Respondents). (*Granted*).

0779-78-M: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. Residential Sheet Metal Contractors Organization and Applewood Air Conditioning Ltd. (Respondents). (*Withdrawn*).

0806-78-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. All Railings & Iron Works Co. (Respondent). (*Withdrawn*).

0843-78-M: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Difcon Construction Limited (Respondent). (*Withdrawn*).

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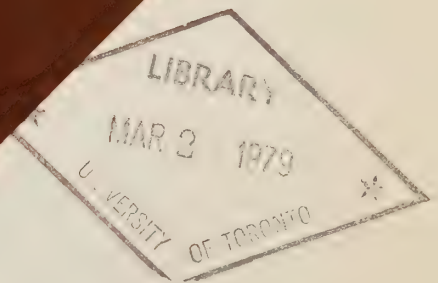


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**A Monthly Series of Decisions from the
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Selected decisions of particular reference value are
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0759-78-M Labourers' International Union of North America, Local 183, (Applicant), v **Arena Cement Finishing Co.**, (Respondent).

Arbitration – Applicant unsuccessful even though respondent failed to appear

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members E. Boyer and E. C. Went.

APPEARANCES: *Lou Castaldo for the applicant; no one appearing for the respondent.*

DECISION OF THE BOARD; October 23, 1978

1. This is a referral of a grievance to the Board for determination pursuant to section 112(a) of The Labour Relations Act.
2. The grievance alleges that the respondent has violated a collective agreement between the parties by sub-contracting out certain work contrary to the terms of Article XV of the agreement. This article provides that work cannot be sub-contracted out by the respondent unless the sub-contractor involved has a bargaining relationship with the applicant.
3. Although duly served with notice of the hearing in this matter the respondent failed to attend at the hearing. Therefore the only evidence and representations before the Board are those tendered by the applicant.
4. It is the applicant's contention that the respondent was engaged to perform the finishing work on some apartment building balconies, but that rather than do the work itself it sub-contracted out the work to a second firm which has no bargaining relationship with the applicant. On the basis of this allegation the applicant requests that the Board direct the respondent to cease sub-contracting out the work and to pay the applicant compensation in excess of \$15,000.
5. The applicant led certain direct evidence before the Board to establish the existence of the collective agreement as well as the fact that certain finishing work was being done on the balconies in question. However, the only evidence led in support of the allegation that the respondent had any involvement with the work, or that it was the respondent who had subcontracted out the work to the firm actually performing it, consisted of the testimony of one of the applicant's business agents Mr. M. Mihajlovic. Mr. Mihajlovic stated that he was told by two men doing the work that it had been sub-contracted out by the respondent. This evidence was clearly hearsay in that it amounted to a mere repetition of statements made by others. Further, it should be noted that the basis upon which these two individuals concluded that the respondent had subcontracted out the work is not before the Board.
6. In response to a question from the Board, the representative of the applicant contended that the nature of the evidence tendered at the hearing was "not a problem" in that the respondent was not in attendance. With this assessment we are unable to agree. Leaving aside the matter of discharge and discipline cases, in any arbitration proceeding the onus of establishing a violation of a collective agreement lies with the party alleging the violation. As a result, that party is obliged to lead evidence sufficient to justify a conclusion that the

alleged violation did in fact occur. The responding party is also entitled to call evidence, but its failure to do so will not automatically result in a ruling against it since the evidence which was led, although uncontradicted, may not have been sufficient to establish a violation of the agreement. When the responding party stays away from the hearing altogether, it does so at its peril in that it obviously will not be in a position to lead any evidence to contradict that led by the other side. The mere act of staying away, however, does not serve as an admission of liability or as a waiver of the right not to be found to have violated an agreement except where so warranted by the evidence. It is apparent that this principle was adopted in *Re Bricklayers, Masons Independent Union of Canada Local 1*, and *J. Ratnieks Bricklaying* (1966) 17 L.A.C. 169 (Arthurs) and in *Re Int'l Longshoremen's Ass'n, Local 1842 and Brown & Ryan Ltd.* (1964) 15 L.A.C. 191 (Arthurs), both being cases where the party alleged to have violated a collective agreement failed to attend at the hearing. In the *Ratnieks* case it was the employer which absented itself from the hearing, while the *Brown & Ryan* case involved a grievance filed against the union by the employer where the union declined to attend the hearing.

7. We recognize that there may be instances where the evidence required by a union to establish that an employer in the construction industry has violated a collective agreement is peculiarly within the knowledge or possession of the employer. In such cases, however, it is open to the union to serve a Summons to Witness (subpoena) upon an officer or official of the employer requiring his attendance at the hearing so that he can be called as a witness by the union. The person being subpoenaed can also be required by the terms of the Summons to Witness to bring with him and produce at the hearing any documents in his possession or under his control which are relevant to the proceedings. Should the Summons to Witness not be obeyed, then it would be open to the union to request an adjournment of the hearing so as to allow it an opportunity to take the necessary steps to compel the individual involved to appear before the Board.

8. In the instant case the applicant in seeking to establish a key element of its case relied upon the evidence of one of its business agents as to what was told to him by two individuals who were not officers or officials of the respondent concerning an alleged sub-contracting arrangement between the respondent and another firm. It is our view that this type of evidence is inherently so unreliable that it cannot be given any weight. In these circumstances we are of the view there is no evidence before the Board upon which we can base a finding that the respondent has violated the collective agreement. Accordingly the grievance is hereby dismissed.

1051-78-U David Gallawan, (Complainant) v **Babcock & Wilcox Canada Ltd.** and **United Steelworkers of America Local 2859**, (Respondent).

S-79 – Duty of Fair Representation – Alleged misconduct in processing grievance –

Allegation dismissed

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. G. Bourne and O. Hodges.

APPEARANCES: *Peter George, D. Gallawan, Judy Gallawan and Dr. J. Kirkwood Achiume for the complainant; T. F. Storie, R. Hawker and T. Toner for the respondent company; B. Munro, F. Crystal, R. Kelly and Gerry Reed for the respondent union.*

DECISION OF THE BOARD; October 30, 1978

1. The style of cause is amended by deleting as complainant "Peter George" and substituting "David Gallawan".

2. This is an application under section 79 of the Act alleging a contravention of section 60 of the Act by the respondent union.

3. The complainant, Gallawan has been employed for some ten years as a "Submerge Arc Welder" which position involves from time to time working in a confined area inside a metal tank under extreme heat conditions, and which is classified in Level 12 of the Collective agreement. Gallawan found that the conditions were taxing him physically and in early February 1978 applied to be transferred to the position of Expediter which was rejected by the Company on the grounds of lack of qualifications. On June 6, 1978 while at work, Gallawan became nauseated and felt dizzy; the Company took him to the hospital where he was checked by a doctor substituting for his own doctor who was then away, his condition diagnosed as heat stroke and advised to remain off the job for two days, and not to do that part of the job involving extreme heat.

4. Gallawan reported for work on June 9th and met with his foreman and that foreman's superior and was informed that the Company couldn't keep him on as a Submerge Arc Welder unless he could do the total job and that they would re-assign him as a helper and suggested he discuss his situation with the union.

5. Gallawan, Leonard the Chief Steward and Crystal the President of the Union then met with Mr. Grieve the Safety Supervisor and asked about the reduction in job classification and were told that at least that would be done until a report was received from the Company doctor. Following that meeting Crystal's evaluation was that it would be best to wait for the doctor's report and see what action the Company would take. Gallawan returned to his department and worked as a hand welder for three days when his foreman approached him and said that the Company wanted to assign him as a Helper but that he had talked them into assigning him as a Grinder which is a Level 8 job (2 levels higher than the helper). His foreman advised him to see the Union.

6. Gallawan reported this development to Crystal who undertook to look into and returned saying he understood Gallawan refused to go on the Submerge Arc Welding job. Asked if this was so, Gallawan said he had never refused to go on the job but that he had told the Company his doctor's recommendation that he not do the extreme heat portion of that job and Crystal suggested a grievance be filed which was done on June 18th. The evidence is that the opinion of the doctor who saw Gallawan at the hospital, the opinion of

Gallawan's personal physician, and the opinion of the Company physician were all to the effect that Gallawan should not work in extreme heat conditions. With these opinions, Gallawan himself concurs.

7. In the next few days Gallawan was told by his foreman that he would be going to work temporarily in the Production office where he was informed that he would be Expediting and that Cameron, in charge of that office, more or less told him it was because of the grievance. Gallawan continued to be paid at Level 8: the experienced Expediter's job is Level 10 although a learner expeditor level is Level 4. Gallawan stated he was quite happy on the Expediting job but told Leonard that he wanted the grievance of June 18th to continue till he got a positive answer: that grievance, signed by Gallawan, stated "I, Dave Gallawan, grieve that the Company gave me an unsatisfactory demotion. I request that I be given a job I don't have to drop 4 job classifications."

8. Gallawan states that he enquired of Leonard on three occasions if there had been any second step answer and received the reply that Leonard hadn't seen Crystal. One day Gallawan was in the storeroom where Leonard and Crystal were standing together and Leonard called Gallawan to come over, and Gallawan asked Crystal about the grievance. Crystal's response was "What the f--k are you doing bothering my stewards all the time? What the f--k do you want? I got you off the f--king grinding and got you another job." According to Gallawan, Crystal then quieted down and gave him an envelope containing the Company's second step reply which was, "As soon as this employee can be placed in position more compatible with his wishes and previous job class this will be done". Gallawan states that he was mentally upset by Crystal's prior statements and didn't really understand the meaning of what he had read. However there was the additional discussion which follows and which seems to us to clearly indicate that Gallawan fully understood the impact of the Company reply:

Gallawan: Don't you realize the Company has told me the Expediting job is temporary.

Crystal: Most temporary jobs like that will be permanent so there is no sense in the meantime doing anything about it. I can't be your baby-sitter. What do you want me to do, kiss your ass? I've got more than you to worry about.

9. Towards the end of July Gallawan was informed that he would be transferred back to Grinding after the plant shutdown which would be last week in July and first week in August. Crystal told him to wait until it happened. Following shutdown Gallawan was placed on grinding. Crystal looked into the matter and in a couple of days advised Gallawan that the Company was planning to put him on as a "learner-fitter" as soon as an opening arose but that he couldn't say when that would be.

10. Gallawan then consulted Peter George, a fellow employee who has on three occasions filed section 60 complaints against this Union which have on each occasion found to be unfounded. As a result Gallawan talked to Gerry Reed, the area Representative for the respondent and was advised to talk to Crystal again. Gallawan had a 45 minute to one hour conversation with Crystal on the phone and Crystal said "No" and according to Gallawan, since he knew I had already talked to George he said "you know how to carry on don't you".

11. Gallawan then had a one hour and twenty minute discussion with Levesque the Assistant District Director of the respondent in Toronto, and after not hearing further from him in two weeks had George file this application on his behalf.

12. In cross-examination it was established that the volume of work in the plant has been drastically reduced and that while the normal complement of Submerge Arc Welders is 12, there are now working only five or six. It was also established that the element of the job requiring working under extreme heat would be 15-20% of the job and that this condition was true of all employees in that classification. Further, that Gallawan had no experience other than Submerge Arc Welding and that he had applied for transfer to some six jobs.

13. Gallawan stated that he was satisfied with the Expediting job even though he was paid at Class 8 instead of 10 (although he admits a learner-expediter is paid at Level 4). When the question was put to him "Chipper Grinder is Level 8, what's wrong with that?" his response was "I didn't apply for it."

14. At the hearing the Board, on its own motion, at the close of the complainant's case invited argument as to whether a prima facie case had been made out. Following argument the Board dismissed the complaint and undertook to provide written reasons therefor.

15. It is clear to us that the facts as recited fail completely to provide any evidence whatsoever of arbitrary, discriminatory or bad faith dealing on the part of the respondent in representing Gallawan in his grievance. On the contrary, the evidence establishes that at every point when Gallawan expressed dissatisfaction with his status, the Union took the matter up with the Company and negotiated a reasonable settlement; as was the second step answer that "as soon as this employee can be placed in a position more compatible with his wishes and previous job class this will be done"; and following that arranged for his temporary assignment as an Expediter; and following that negotiated a commitment from the Company that he would be placed as a "learner-fitter" as soon as there was an opening. Despite the use, at one stage, of earthy and colourful shop language by Crystal in his discussion with Gallawan, the evidence is that Crystal continued to give Gallawan good and proper representation in seeking a solution to his grievance. In our view these actions, far from demonstrating any failure by the Union to properly represent Gallawan, demonstrate a persistent and diligent pursuit of an acceptable solution within the framework of existing conditions and a general layoff condition in the plant.

16. Gallawan, in our view, completely misconceives the obligation which falls on the Union as a result of section 60 of The Labour Relations Act. Section 60 states that the Union must not act arbitrarily. In other words, that it must examine all the facts and act on them and this it did in this case. Section 60 also states that the Union must not act discriminatorily: in other words, it must not treat Gallawan any differently than any other employee who has a grievance. There is no evidence of such discrimination. Section 60 also states that the Union must not act in bad faith: in other words, that the Union must not act deceptively or otherwise misrepresent their actions but must be sincerely and honestly striving to accomplish a grievance settlement in the interests of the grievor. Again, there is no evidence of bad faith in this case. What section 60 does not require of a Union is that it continue to process a grievance, which in their judgement, has been adjusted in accordance with the collective agreement and represents in the Union's judgement, the maximum recognition of the

grievor's interests which can be reasonably expected, provided always that the judgement shall not be arbitrary, discriminatory or made in bad faith.

17. For these reasons the application is dismissed.
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0180-78-R Ontario Nurses' Association, (Applicant), v **Belvedere Heights Home for the Aged**, (Respondent).

Certification – Employee – Supervisory functions distinguished from managerial functions

BEFORE: Donald D. Carter, Chairman, and Board Members J.D. Bell and W.F. Rutherford.

APPEARANCES: *Elizabeth McIntyre for the applicant; Keith Billings, D.G. Barker and S. Hamor for the respondent.*

DECISION OF THE BOARD: October 25, 1978

1. This is an application for certification.
2. The Board, after finding that the applicant had status as a trade union, appointed a Labour Relations Officer to inquire into the duties and responsibilities of the registered nurses employed by the respondent. The respondent took the position that all of the registered nurses that would fall within the bargaining unit proposed by the applicant were employed in a managerial capacity and, therefore, excluded from collective bargaining by section 1(3)(b) of the *Labour Relations Act*.
3. A hearing was held by the Board to receive representations as to the conclusions that the Board should draw from the report of the Labour Relations Officer. The report reveals that the respondent operates a home for the aged. The home, although providing a certain amount of minor medical care to the residents (including the dispensing of medications, the giving of eye drops and ears drops, and the changing of dressings) is essentially a residential home rather than a nursing home.
4. The nurses in question are employed by the respondent in the capacity of R.N. Supervisor. Their immediate superior was the Director of Nursing, Mrs. Dwinnell, who in turn reported to the respondent's administrator, Mr. Barker. The job description for the R.N. Supervisor, as prepared by the Nursing Director, is set out below:
 - 1) All R.N.'s to report 15 minutes prior to their shift so they can receive a proper nursing report, i.e. – 6:45 a.m., 2:45 p.m. and 10:45 p.m.
 - 2) Report any lateness of staff members under your supervision in a written report for Nursing Director.
 - 3) It is to be understood the residents of the Home come first.

- 4) If you must work 10-15 minutes overtime, please keep a personal record.
- 5) If at the end of your shift, you find problems that have not been resolved, you are expected to resolve them or make adequate arrangements with your oncoming shift supervisor.
- 6) Administration office is open Monday to Friday from 8:30 – 4:30 inclusive, 5 days a week. Any queries from relatives, friends, etc. on weekends, i.e. Saturday and Sunday, should be referred to Administration office during designated times as stated above. Most statutory holidays, Administration office will not be open. i.e. – Relatives are to be requested to call during administration business hours regarding finances, etc.
- 7) Proper attire in suitable well-fitting uniforms in good repair are necessary and a cap must be worn at all times while on duty.
- 8) All accidents shall be reported and medical forms have been supplied. Assumptions are no excuse for not properly reporting them. If unsure of a resident's condition after an accident, do not hesitate to recommend an X-ray.
- 9) You are to see that 15 minute coffee breaks and 1/2 hour lunch breaks are adhered to by the staff.
- 10) Any money found on weekends, keep in drug dispensary room until office hours commence on Monday. State area money found and who the owner may be. i.e. – resident.
- 11) R.N. Shift supervisors are responsible to notify Nursing Director for keeping inventory at a proper level. e.g. – drug supplies, incontinent pads, etc. and this includes proper inventory on the floors.
- 12) No keys are to be given to anyone. They are to be handed from R.N. as the shifts progress.
- 13) You are to promote good public relations between all departments at all times so that our residents may enjoy their home.
- 14) You may approach at any time the Director of Nursing with a complaint or constructive criticism whether it be staff, resident or nursing procedure or whether it be medical or administrative.
- 15) The R.N. Supervisor is in charge of building, grounds, and residents, when administration office is not open. Should an emergency arise, Parry Sound Police are available, maintenance staff is available and Doctors are on call.
- 16) R.N. Supervisors upon being queried by a staff member should

use the privacy of the nursing office and no discussion shall take place on the floors. This also includes relatives of a staff member.

- 17) All staff are to leave the premises upon the completion of their shift. If a staff member wishes to remain, a reason satisfactory to the R.N. Supervisor must be given and permission granted by the R.N. Supervisor.
- 18) No staff member other than an R.N. supervisor is to enter the drug room. Cleaning staff must be accompanied by the R.N. while cleaning. The door is to be kept locked at all times. – if R.N. is elsewhere, even at the desk.
- 19) The Home Physician is Chief of Medical Staff. He is directly responsible to the Board of Management of the Home for medical care of all residents in the Home. He is responsible for the cleanliness of the Home, staffing of the nursing department, the quality of food, etc.
- 20) The Home Physician is responsible for all admissions and discharges into and out of the home and has involvement in the administrative procedures and the nursing department.
- 21) The staff are not permitted to use any material and equipment of the Belvedere Heights without express written permission.
- 22) No R.N. is permitted to dispense residents' drugs to a staff member under any circumstance.
- 24) Cardex Order Book, Report Book are all to be kept in locked drug room.
- 25) Any staff member reporting for duty in an unfit condition, i.e. alcohol, is to be dismissed from duty for the remainder of that shift and a written report made to the Nursing Director with a recommendation. The dismissal shall take place in the nursing office.
- 26) If shift supervisor finds staff finished early, this would be a good opportunity for staff to visit residents separately.
- 27) No R.N. is to dispense drugs poured by another R.N. supervisor unless performed under extremely unusual circumstances.
- 28) No drugs are to be poured from one bottle to another. To do so would be a direct contravention of Home for the Aged Act.
- 29) No R.N.A. is permitted to dispense drugs at any time.
- 30) Confidentiality regarding the residents and affairs of Belvedere Heights (*Your Employer*) is to be strictly adhered to.

- 31) Nursing is not to interfere with any other department. If another department interferes with nursing, a written report is to be made to the Nursing Director and she will deal with it. This is an order to provide a continuity of harmony between the various departments.
- 32) The R.N. Shift Supervisor is responsible for maintenance of Home equipment and must be responsible to notify maintenance regarding equipment and building repairs and faulty equipment. i.e. special care light panel at nursing desk.
- 33) Any dereliction of above directives shall and will result in warning, suspension or dismissal.
- 34) Any directives from the nursing office come directly from the nursing office and no other office. This is to be clearly understood! These directives may need to be revised from time to time as circumstances change.

5. There are three shifts at the nursing home – 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., 11:00 p.m. to 7:00 a.m. The work schedule of the Supervisors are drawn up by the Nursing Director, but there was evidence that the Supervisors could change shifts by agreement among themselves. The Supervisors are paid at an hourly rate and at time-and-a-half that rate for any overtime work performed. Only one Supervisor is assigned to the latter two shifts in the day. When the Director of Nursing is absent from the home, either on holidays or on her day off, the Supervisors fill in for her on their own shift. The work schedule of the aides and orderlies, however, is arranged in advance by the Director.

6. During the 3:00 p.m. to 11:00 p.m. shift the Supervisor is the most senior person working at the home and exercises certain supervisory functions. Also working at this time are four aides, an orderly, at least five kitchen staff, and a night watchman. These staff members report to the Supervisor. The Supervisor has the authority to assign overtime where it is necessary to cover for an employee arriving late for the shift. Where an employee calls in sick the Supervisor has the authority to call in a replacement determined by reference to a seniority list. The Supervisor also records the hours of work of the employees working on the shift, as well as for herself. When problems arise on a shift the Supervisor on occasion consults either the Director or the Administrator.

7. The Supervisor has the authority to send home for the balance of a shift any employee who reports for work in an intoxicated state, and to report the matter to the Nursing Director. The evidence in the report indicates that this is the extent of the Supervisor's power to discipline. The supervisors do not possess any general authority to discharge or discipline, or even to recommend that these measures be taken.

8. The Supervisors take no part in the hiring process, nor in the assessment of probationary employees. The evidence indicates that the Supervisors have no role in assessing employees in any systematic manner, although at times they report to the Director particular problems that they are having with employees. At times the Supervisors speak directly to employees about the quality of their work. Employee complaints can be taken to the Super-

visors and discussed, as provided by the first step in the grievance procedure set out in the collective agreement covering the other employees working on the shift.

9. The question of whether a person, or group of persons, exercises managerial functions is very much a question of fact to be determined in the circumstance of each particular case. The line between employees and management is often shaded, and any determination of where a person falls can only be reached after a consideration of all relevant factors. The Board, in *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261, made it clear that to establish managerial status it is not sufficient that a person be primarily employed in the direction and supervision of other persons. The Board, in addition, must be satisfied that such person possess effective control and authority over other employees.

10. The evidence in this case does not appear to meet this latter requirement. While the Supervisors do supervise other employees, this supervision is largely carried out in their professional capacity as nurses, and not as members of management. The detailed job description for the Supervisors bears witness to this fact. Only the very limited authority to send home an intoxicated employee for the balance of the shift is contained in this job description. It is clear from the evidence that the Supervisors have no general power to hire, fire, discipline or assess their fellow employees. In this respect, the facts of this case differ markedly from those found in *Oakwood Park Lodge*, Board File No. 0643-77-R. Our conclusion is that the Supervisors do not exercise managerial functions and, therefore, are not excluded from collective bargaining by operation of section 1(3)(b) of the Act.

11. The Board finds that all registered and graduate nurses employed in a nursing capacity by the Belvedere Heights Home for the Aged, Parry Sound, save and except the Director of Nursing and persons above the rank of Director of Nursing constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The membership evidence submitted by the applicant indicates that, of the nine employees in the bargaining unit at the time the application was made, seven were members of the applicant as of the terminal date.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 4, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

0997-78-U Local 1590, International Brotherhood of Electrical Workers, (Complainant), v **Cable Tech Wire Company Limited**, and Siegfried Riemer, (Respondents).

S-79 – Duty to Bargain in Good Faith – Board held that duty to bargain not suspended by mere filing of judicial review alleging jurisdictional error.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and M. J. Fenwick.

APPEARANCES: *B. Fishbein and M. Fisher for the complainant; W. J. McNaughton and S. Riemer for the respondents.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER M. J. FENWICK; October 12, 1978

1. This is a complaint under section 79 of The Labour Relations Act in which the complainant alleges that the respondent employer has violated section 14 of the Act. Section 14 stipulates that after a newly certified trade union has served written notice of its desire to bargain on the employer the parties shall meet within 15 days, or within such further period as may mutually be agreed upon, and bargain in good faith and make every reasonable effort to make a collective agreement.

2. The complainant was certified by the Board as the bargaining agent for a unit of the respondent employer's employees on June 21, 1978. The respondent subsequently requested that the Board re-consider its decision to certify the applicant, a request which was refused by the Board on July 17, 1978. On or about August 22, 1978 the respondent employer filed with the Divisional Court an application for Judicial Review wherein it requested that the Court set aside the certificate issued by the Board.

3. On or about July 5, 1978, the complainant served written notice upon the respondent employer of its desire to bargain with a view to making a collective agreement. The parties have not yet met and bargained. At the hearing it was contended by counsel for the respondents that the parties did not meet during July or the first three weeks in August solely due to conflicting vacation plans and faulty communications between the parties. Counsel conceded, however, that since August 22, 1978 the respondent employer has refused to meet with the complainant despite requests that it do so. Having regard to this admission we are satisfied that the respondent employer has failed to meet and bargain in good faith with the complainant, notwithstanding the fact that as a certified trade union the complainant has served written notice upon the employer of its desire to bargain with a view to making a collective agreement. Accordingly we hereby find that the respondent employer has violated section 14 of the Act. There remains, however, the question of whether the respondent employer should now be directed by the Board to meet and bargain with the complainant.

4. This complaint was filed on September 8, 1978. The complaint requests, inter alia, that the respondent employer be directed to commence to bargain in good faith. On September 12, 1978 the Board's Registrar issued a letter to each of the parties enclosing both a

copy of a Board decision appointing a Labour Relations Officer with respect to the complaint and also a formal notice of hearing indicating that the matter had been set down for hearing on September 29, 1978. The respondents were served with this letter on September 20, 1978. On September 26, 1978, the respondent employer made an application to the Divisional Court for an order staying the Board's certificate until the final disposition of the Judicial Review. The application for the stay will likely not be heard by the Court until October 30, 1978.

5. Notwithstanding the refusal of the respondent employer to meet with the complainant prior to the application to the Court for a stay, at the hearing counsel for the respondents acknowledged that if the stay were not granted by the Court then the respondent employer would be required to meet and bargain with the complainant. However, submitted counsel, the respondent employer should not be required by the Board to bargain with the complainant pending the outcome of the application for a stay.

6. The Board has on a number of occasions been asked to suspend its proceedings pending the outcome of an application for Judicial Review. In recent years the Board's response to such requests has been to determine whether the particular circumstances of each case favours proceeding forward or temporarily suspending the proceedings pending the outcome of the Judicial Review. We are of the view that the Board should follow the same type of approach when asked to await the outcome of an application for an order staying a Board decision.

7. One of the considerations the Board must take into account in seeking to determine which course to follow is the effect of delay in labour relations. As the Court of Appeal noted in *Re The Journal Publishing Company of Ottawa Limited and The Ottawa Newspaper Guild Local 205* (oral judgment released May 17, 1977, unreported) the law which has grown up around labour relations recognizes the principle that "labour relations delayed are labour relations defeated and denied." In our view the effect of any delay in the commencement of collective bargaining after a trade union has been certified is particularly acute. Employees join a trade union to secure the benefits of collective bargaining. Where such collective bargaining does not even begin for a protracted period of time because of the refusal of an employer to meet with the trade union, a likely result is that the trade union will become discredited in the eyes of the employees, causing its support among the employees to erode. Even if collective bargaining does get underway subsequently, the union may well find itself unable to fully reclaim this lost ground. Against this concern for the possible effects of delay in commencing bargaining is to be weighed the additional expense and inconvenience to the respondent employer which would result if it were required to commence bargaining with the complainant and the Court later granted the application for a stay and/or if the Court eventually set aside the certificate altogether.

8. The complainant trade union was certified on June 21, 1978 but to date no collective bargaining has occurred. The respondent employer filed its application for Judicial Review on or about August 22, 1978, that is approximately two months after the issuance of the Board's certificate. It did not at that time request an order staying the Board's certificate. Rather, the stay application was filed only three days prior to the date set for the hearing of this complaint by the Board. When to the time which has already lapsed is added the time before the stay application will be heard by the Court, it means that over four months will have passed between the issuance of the Board's certificate and the hearing on the stay

application. Having regard to the time involved and to the possible prejudice to the complainant of any further delay we are of the view that in the particular circumstances of this case the respondent employer should be directed to forthwith meet and bargain in good faith with the complainant.

9. We would stress that the obligation to meet and bargain in good faith does not mean that the parties cannot take into account in their negotiations either the application for Judicial Review or the application for a stay. It is instead open to the parties to make provision for the possibility that the Court may temporarily stay the Board's certificate and/or permanently set it aside.

10. Having regard to the above we hereby direct the respondent employer to forthwith meet and bargain in good faith with the complainant and make every reasonable effort to make a collective agreement.

11. The decision of Board Member Ade will be forthcoming at a later date.

2022-77-U; 1999-77-U; 2000-77-U; 2001-77-U Gerald Chevette, Roderick John MacLean, Charles C. Lodge, James Pollock (Complainants) v **Canadian Gypsum Construction**, Robert Myers (Respondents).

Employee – Health and Safety – Alleged discrimination in employment because of exercise of rights protected by the Act – Employee refusal to work occasioned by employer failure to provide toilet facilities – Complaint sustained

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and F.W. Murray.

APPEARANCES: *Paul Falkowski, Charles C. Lodge and Roderick John MacLean for the complainants; D.F. Hersey and R. Myers for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER D.B. ARCHER; October 19, 1978

1. The Board directs that the above complaints be and the same are hereby consolidated.

2. This is a complaint filed under Section 9(2) of Bill 139, an Act respecting Employees' Health and Safety (hereinafter referred to as the Act). The complaint alleges that the respondent company violated section 9(1) of the Act in dismissing from its employment Messrs. R.J. MacLean, C.C. Lodge, J. Pollock and C. Chevette because they had acted in compliance with the Act.

3. The company operates a Gypsum mine at Hagersville, Ontario. The named complainants were employed by the company on an underground construction project which

commenced in March of 1977. The company encountered difficulty in recruiting a full complement of construction miners and as a result it offered employment to construction miners, including the named complainants, at terms and conditions of employment which were better than those under which its production miners worked. The construction miners were paid at a higher rate, were provided with furnished accommodation and transportation to the mine and in addition, were paid a relocation allowance of \$1,000 payable after six months of service. In February/March, 1978 the company had in its employ 52 production miners and 15 – 20 construction miners.

4. The construction and production miners used the same change room, lunchroom and underground toilet facilities from the commencement of the construction project. On February 28, 1978, however, Mr. Don Duncan, the mining superintendent wrote an inter-office memo to the plant co-ordinator complaining that construction miners were sleeping and playing cards in the production lunchroom and requesting that henceforth construction miners be prohibited from using the production facilities. On March 1st or 2nd, Mr. Larry Metcalfe, responsible for underground construction, advised his foreman that the construction crews were no longer permitted to use the production facilities. Mr. Metcalfe testified that there were comparable lunchroom and sanitation facilities available underground for the construction crews. The company officials testified that in view of the complaint filed by Mr. Duncan against the construction miners and the animosity which was developing because of the favoured treatment afforded the members of the construction crew, it was decided to segregate the two groups as much as possible.

5. Mr. Paul Malta, the foreman of the construction day shift, advised his crew of the prohibition at about 7:00 a.m. on Monday, March 6th. After being advised by Mr. Malta that they were no longer permitted to use the construction facilities, the complainants and other members of the crew discussed the situation with Mr. Metcalfe at about 8:00 a.m. The evidence establishes that Mr. Metcalfe undertook to supply toilets and to fix-up the lunchroom in the near future but said he could do nothing about the drinking water. The crew requested and was given permission to meet with Mr. Myers. Five of the eight members of the crew who went to the surface to meet with Mr. Myers changed into street clothes for what they described as a "safety meeting". The meeting commenced shortly before 9:00 a.m. and the same subjects were raised with Mr. Myers as had been discussed underground with Mr. Metcalfe. It is clear on the evidence that the employees were primarily concerned with regaining the use of the production facilities. Mr. Myers responded in much the same manner as Mr. Metcalfe had about an hour before. In explaining the reason for the company's action he made reference to the preferential treatment enjoyed by the construction miners and the friction which had been created between the production and construction miners. At about 9:30 Mr. Myers inquired as to which shift the employees were scheduled to work and when told they were working the day shift he directed them to return to work or punch out. Although the evidence is conflicting, the Board is satisfied that at this point some of the employees told Mr. Myers they had no intention of going back underground. Mr. Myers replied that if they punched out he would have no recourse but to consider that they had terminated themselves by walking off the job.

6. The four complainants decided to punch out following the meeting with Mr. Myers. The other members of the crew who were present at the meeting returned to work. Mr. Maclean testified that he had "walked-off the job" previously. He testified that in the past he had refused to dry drill without a mask and was provided one within an hour, that

he had refused to drill with a jack leg when a stooper should have been used and that on a number of occasions he had refused to operate the scoop tram because of faulty brakes. In each case his foreman found other work for him to do. Mr. MacLean referred to the company's decision to lock the construction crew out of the toilets as "the straw that broke the camel's back." He testified that the only other toilet available to members of the construction crew, of which he was aware, was sitting in a water hole half full of human excrement some 150 feet from the the ramp area. Mr. Lodge testified that as far as he was aware the only other underground toilet which was available to the construction crew was a 5 gallon tin pail with a garbage bag inside overflowing with human waste. Although the evidence establishes that Mr. Myers purchased two portable chemical toilets in March, 1977, neither Mr. Lodge nor Mr. MacLean, the two complainants who gave evidence, had seen these toilets underground and it is clear from the responses made by both Mr. Metcalfe and Mr. Myers on the morning of March 6, 1978 that they did not know if they were in use at the time. Mr. Metcalfe undertook to supply toilets. Mr. Myers, who spends the bulk of his time above ground, had little knowledge of the toilet facilities underground. Mr. Myers did acknowledge that no one person was assigned responsibility for emptying the underground toilets. The task was left to the employees generally.

7. Although not covered by a collective agreement, Messrs. Lodge, MacLean, Pollock and Chevrette returned to Simcoe and called a representative of the United Steel Workers. Mr. Lodge testified that they were advised to return to work the next day and ask their supervisor to call in a mine inspector. The next morning Messrs. Lodge, MacLean and Chevrette returned to work. Mr. Pollock did not. Mr. Metcalfe approached them while they were changing for work and advised that as far as he was aware they had quit their employment and suggested they see Mr. Myers. The three complainants waited for Mr. Myers to arrive at his office, whereupon a confrontation ensued. Mr. Myers told the three that they had quit their employment and were no longer employees of the company. Their separation documents had been completed the day before. Mr. Myers refused to call a mining inspector when asked and ordered them off the property. He refused to allow them to use the telephone, called the Ontario Provincial Police and asked to have the three complainants removed from the company property. The three refused to accept their U.I.C. separation slips which showed "quit" as the cause of separation.

8. The Mining, Health and Safety Branch of the Ministry of Labour was contacted and Mr. J.I. Whiting, P. Eng., a mining engineer with the branch, was assigned to do an inspection of the company's Hagersville mine. He carried out his inspection on March 8, 1978 and reported by letter dated March 9, 1978. He directed the company to comply with 13 separate orders listed in his report. The orders cover a wide range of subjects beyond those complained of by the employees on March 6th. Although the complainants may have been concerned about some of the subjects referred to in the report of the mining inspector which were not discussed with the company on March 6th, it is clear that their actions on March 6th stemmed from the decision of the company to deny them use of the production facilities. Lunchroom and toilet facilities and the quality of drinking water were the only subjects discussed with management on March 6th, 1978. Those matters referred to in the report or in evidence which were not raised on March 6th, did not cause the employees to refuse to work and accordingly, the Board need not concern itself with them.

9. Two of the orders set-out in the report of the mining inspector deal with matters raised by the employees on March 6th. They are:

"Potable water to the standard of drinking water set by the Ontario Water Resources Commission shall be provided at the lunchroom. Section 205(1), (2) and (4).

A man shall be designated to empty the chemical toilets once per week, towards the end of his regular working shift, and that man shall be paid four (4) hours unworked overtime for that shift. Section 610 (1)(d)."

Mr. Whiting testified that his order in respect of the drinking water had to do with where it was located and not with its quality. He admitted that he had no knowledge as to whether it was "potable water" within the meaning of the Mining Act. He further testified that the portable chemical toilet designated for use by construction miners, which he saw during his inspection was satisfactory. He testified that he made the order to provide for regular emptying of the toilets on the basis of information given to him about the failure of the company to designate an employee to empty the toilets and not on the basis of the condition of the toilets which he saw during his inspection. He did testify, however, that if the toilets had not been emptied, even though employees had been instructed to empty them, a violation of the Mining Act would result. Mr. Whiting explained that his report contained no mention of lunchroom facilities because the company is not required, under the Mining Act, to maintain a lunchroom for the number of employees on shift at the Hagersville Mine.

10. Sections 2, 3 and 9(1) of Bill 139, an Act respecting Employees, Health and Safety, provide as follows:

"2. Where an employee in a work place has reasonable cause to believe that a machine, device or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or a place in or about a work place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act*, 1971, *The Construction Safety Act*, 1973 or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, the employee may refuse to use or operate the machine, device or thing, or work in the place.

3. (1) Where an employee in a work place refuses to use or operate a machine, device or thing or refuses to work in a place therein because he has reasonable cause to believe that the machine, device or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or the place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act*, 1971, *The Construction Safety Act*, 1973, or Part IX of *The Mining Act* or any regulations thereunder, as the case may be, he shall forthwith report the circumstances of the matter to his employer or the person having control and direction over him who shall forthwith investigate the report in the presence of the employee and, if there is such, in the presence of either a health and safety representative, a committee member who represents employees, or a person authorized by the trade union that represents the employee.

(2) Where the employer or the person having control and direction over the employee disputes the report or takes steps to make the machine, device,

thing, or place safe or comply with *The Industrial Safety Act*, 1971, *The Construction Safety Act*, 1973 or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, and the employee has reasonable cause to believe that the machine, device or thing is or continues to be unsafe to use or operate because its use or operation is likely to endanger himself or another employee or the place is or continues to be unsafe for him to work in or the machine, device, thing or place is or continues to be in contravention of *The Industrial Safety Act*, 1971, *The Construction Safety Act*, 1973 or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, he may continue to refuse to use or operate the machine, device or thing, or work in the place unless a collective agreement binding the employee expressly provides otherwise.

(3) Where the employee continues to refuse to use or operate the machine, device or thing, or work in the place or having returned to work in compliance with the express provisions of a collective agreement binding the employee files a grievance concerning his right to continue to refuse to use or operate the machine, device or thing or work in the place, the employer or person having control and direction over the employee shall notify an appropriate inspector or an engineer, as the case may be, who shall investigate the matter in the presence of the employer or the person having control and direction over the employee, the employee and, if there is such, either a health and safety representative, a committee member who represents employees or a person authorized by the trade union that represents the employee.

(4) The inspector or engineer shall, following his investigation, make a decision whether the machine, device or thing is unsafe for the employee to use or operate or the place is unsafe for the employee to work in or the machine, device, thing or place is in contravention of *The Industrial Safety Act*, 1971, *The Construction Safety Act*, 1973 or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be.

9. (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss an employee;
- (b) discipline or suspend or threaten to discipline or suspend an employee;
- (c) impose any penalty upon an employee; or
- (d) intimidate or coerce an employee,

because the employee has acted in compliance with this Act.”

11. Section 2 of the Act establishes the right of an employee to refuse to work when he has “reasonable cause” to believe that the conditions specified in the section exist. Section 3 of the Act outlines a procedure to be followed when an employee who has “a reason-

able cause to believe that the conditions referred to in Section 2 of the Act prevail, refuses to work. The employee is not permitted to leave the work place. He must report the circumstances giving rise to his concern to the employer who in turn must investigate. If the employer after investigating disputes the report of the employee or takes corrective action, the right of the employee to refuse to work is maintained if he still has reasonable cause to believe that the conditions specified in Section 2 prevail. If the employee continues to refuse to work the employer is required to notify the appropriate inspector or engineer who shall investigate and make a decision as to whether the conditions set-out in Section 2 of the Act are present. The Act does not deny the employee the right to continue to refuse to work in the face of a decision by an inspector that the conditions specified in Section 2 do not prevail, so long as he continues to have reasonable cause to believe that they do.

12. The right of an employee to refuse to work under Bill 139 is not an absolute right. It is predicated upon "reasonable cause to believe" that the conditions specified in Section 2 of the Act prevail. If an employee cannot establish that he has "reasonable cause to believe" that the conditions specified in Section 2 prevail, or if he does have "reasonable cause to believe" but refuses to work for some other reason he is not acting in compliance with the Act and is not protected by the Act. The procedure set-out in Section 3 is one which has been purposely designed to focus the attention of the parties on the immediate problem, to facilitate a resolution of the problem, and, in the event the employee continues his refusal to work, to test the reasonableness of his belief that the conditions specified in Section 2 exist. If the employer, after investigating, denies that there is any validity to the employees' belief or takes corrective action, it will be more difficult for the employee to establish that he has "reasonable cause to believe" that conditions exist which permit him to refuse to work. If an employee establishes his right to refuse to work following the employer's investigation, the matter must be investigated by an inspector who must make a decision as to whether the conditions set-out in Section 2 of the Act are present. An employee who continues to refuse to work in the face of an investigation and a decision by a neutral expert that these conditions do not exist, must meet the substantial onus of establishing that he has reasonable cause to believe otherwise and is entitled to the protections of the Act.

13. Section 9(1) of the Act prohibits an employer from dismissing, disciplining or suspending an employee or threatening to do any of these things or from imposing any penalty upon an employee or intimidating or coercing an employee because the employee has acted in compliance with the Act. Section 9(3) empowers the Ontario Labour Relations Board to inquire into any complaint brought under Section 9 and gives to the Board the same powers in dealing with these matters as it has under Section 79 of The Ontario Labour Relations Act in dealing with alleged violation of that statute.

14. The task which falls to the Board in this matter is to determine firstly, if the complainants refused to work because they had "reasonable cause to believe" that at least one of the conditions set-out in Section 2 of the Act was present, in which case they would have been acting in compliance with the Act, and secondly, if the complainants were dismissed because they were acting in compliance with the Act.

15. The evidence establishes that on March 6th Messrs. Lodge, MacLean, Pollock, Chevrette and other members of the day shift of the construction crew reacted strongly to the decision of the company to deny construction miners access to production facilities. They complained to Mr. Metcalfe and met with Mr. Myers in his office above ground. It is

clear that they would have continued to work if the company had agreed to allow them to use the production facilities and it is equally clear that in the face of the company's refusal, the four employees named above who are complainants in this matter indicated that they were not prepared to return to work. The Board is satisfied that none of the complainants had reasonable cause to believe that the workplace was unsafe. The lunchroom, toilet facilities and drinking water complained of by the members of the construction crew did not constitute a safety threat and the members of the crew who refused to work could not have had reasonable cause to believe that they did. The issue is whether or not the complainants had reasonable cause to believe that the workplace was in contravention of the Mining Act and whether it was on the basis of this belief that they refused to work.

16. The complainants, as with most workmen, are unfamiliar with the specific provisions of the Mining Act or the other statutes dealing with employee health and safety. Accordingly, they would have been in great difficulty if they had been relying on a reasonable belief that there had been a technical violation of the Mining Act. In this case, however, they complained about the lack of certain basic amenities of the workplace. Although they could not and did not point to the Mining Act, the Board is satisfied on the basis of their behaviour on March 6th that they knew they were entitled to drinkable water and clean toilet facilities and had reasonable cause to believe that a workplace absent these basic amenities would be in violation of whatever legislation governed their workplace. Indeed, Section 203 of the Mining Act provides:

“There shall be provided in the workings of a mine suitable sanitary conveniences in accordance with the following requirements:

1. Where persons are employed underground, one sanitary convenience for every twenty-five persons or portion thereof on any shift.
2. The sanitary conveniences mentioned in item 1 shall be conveniently placed, having regard to the number of persons employed on the different levels, in a well-ventilated part of the mine.
3. Where persons are employed at an open pit or a clay, sand or gravel pit or quarry, one sanitary convenience and one urinal for every twenty-five persons or portion thereof on any shift.
4. The sanitary conveniences mentioned in items 1 and 3 shall be kept clean and sanitary and the content disposed of regularly.

17. The Board is satisfied that as of March 6, 1978, the day the construction miners were denied access to the production facilities, they did not have access to conveniently placed sanitary conveniences in a well ventilated part of the mine, which were clean and sanitary and the contents disposed of regularly. Messrs. Lodge and MacLean gave evidence that there were no such sanitary facilities at the time and Messrs. Metcalfe and Myers, in responding to the complaints of the construction miners on March 6th, made no reference to their existence. The failure of the company to provide for the regular emptying of the toilet facilities is supportive of the evidence of Messrs. Lodge and MacLean that the only facilities which they saw were not clean or sanitary. In the result the Board is satisfied that as of March 6th, 1978 the workplace was in contravention of the Mining Act and, having regard

to the nature of the violation, that the complainant miners had reasonable cause to believe that the workplace was in contravention of the legislation governing their workplace.

18. Although the complainants did not refer to section 203 of the Mining Act or to any other section of the Mining Act, or to Bill 139, the Board is satisfied that in bringing their concerns to the attention of Messrs. Metcalfe and Myers, and subsequently advising Mr. Myers of their refusal to work, they complied with the essential requirements of Section 3(1) of the Act. The response of the company was not to investigate the employee complaints on March 6th, as it is required to do under Section 3(1) of the Act. Indeed, if an investigation had been made and chemical toilets put in place, the complainants would no longer have had reasonable cause to believe that the workplace was in contravention of the governing statute because of a lack of clean and sanitary toilet facilities. Instead, the employees were directed to return to work or punch out. They were not assigned to other work or asked to remain available for work as would appear to have been the practice of the company in the past in dealing with Mr. MacLean's prior refusals to work. The four complainants refused to go back to work and in the circumstances the Board is satisfied that their refusal complied with the provisions of the Act. Having made this finding, the Board need not determine if the complainants refused to work because they also had reasonable cause to believe that the quality of the drinking water and the lunchroom facilities were in contravention of the statute governing their workplace.

19. The complainants were given two options by Mr. Myers. They were directed to either return to work, which they were entitled not to do, or to punch out. In these circumstances, their decision to punch out cannot be construed as a quitting of employment. The separation documents of Messrs. Lodge, MacLean, Pollock and Chevrette were drawn up on March 6th and although the company listed "quit" as the cause of separation the Board must find that they were dismissed because they had acted in compliance with the Act. The failure of Mr. Pollock to report for work on March 7th does not alter the result. The Board finds that their dismissal from employment was in violation of Section 9 of Bill 139; an Act respecting Employees' Health and Safety.

20. The evidence establishes that the construction project on which the complainants were employed is now completed. The Board hereby directs, therefore, that the four complainants be compensated for all lost wages and benefits resulting from their unlawful termination from the date of their discharge (March 6, 1978) to the date they would have been laid-off for lack of work. The Board will remain seized in the event the parties are unable to agree on the exact amount owing to each of the complainants. The evidence of Mr. A. Shakespeare, a personnel officer with the company, establishes that construction miners were told on hiring that if the company required additional production miners the construction miners who stayed with the company to the end of the construction project would be given "first consideration". Accordingly, the Board further directs that the four complainants, be given "first consideration" in the future hiring of production miners, along with the other construction miners who stayed with the company to the end of the project.

DECISION OF BOARD MEMBER F.W. MURRAY:

The decision of Mr. Murray will follow.

2007-77-R Fuel Oil & Natural Gas Service Technicians Association, (Applicant), v **Comfort Guard Services, a division of Canadian Fuel Marketers Group, Inc.**, (Respondent), v Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

Employee – Whether oil burner servicemen are dependent contractors – Relationship held analogous to employee relationship even though drivers hired helpers on a casual basis

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and D. B. Archer.

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER D. B. ARCHER: October 6, 1978

1. This is an application for certification.

2. By its decision dated April 25, 1978, the Board determined that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act. By the same decision a Labour Relations Officer was appointed to inquire into and report back to the Board on the duties and responsibilities of the oil burner servicemen appearing on the list of employees provided by the respondent. In its reply the respondent took the position that the persons in question are independent contractors and that they are not employees within the meaning of The Labour Relations Act. The applicant maintains that the oil burner servicemen are employees within the meaning of the Act quite apart from the dependent contractor provisions or that, in the alternative, they are dependent contractors within the meaning of section 1(1)(ga) of the Act and are therefore employees within the meaning of section 1(1)(gb) of the Act. A hearing was convened for the purpose of hearing the representations of the parties on the contents of the interim report of the Labour Relations Officer. The interim report consists of the examination of the duties and responsibilities of Mr. Len Judges and, accordingly, this decision deals only with the status of Mr. Judges.

3. Mr. Judges has performed work as a service technician on behalf of the respondent and a predecessor business for some 30 years. His relationship with the respondent is governed, in part, by a written contract which is renewed annually. By the terms of the contract Mr. Judges is assigned a geographic territory in which he provides service to customers of the respondent who have contracted for the purchase of oil and the servicing of their furnace either on an annual basis or on a call-by-call basis.

4. Approximately 60% of the Comfort Guard customers that Mr. Judges services in his territory are under a permanent contract with the respondent for heating service. Comfort Guard pays Mr. Judges a fixed amount for the annual servicing of the furnace of each contract customer. Thus if he does his summer cleaning and overhaul carefully on a given furnace he may have no service calls to make to that customer during the winter. He is not paid anything further in respect of any service calls that he is required to make to a contract customer and in that sense he becomes a guarantor of his own work in what the Board has described in the past as a “sophisticated method of piecework” (*Shell Canada Limited* [1974] OLRB Rep. April 200).

5. Mr. Judges is paid on a call-by-call basis when he performs service for customers who do not have a permanent account. His work for those customers is guaranteed for 10 days and if anything goes wrong with the heating equipment during that time he must repair it again at no further remuneration.

6. According to the terms of his contract with Comfort Guard Mr. Judges is on call to service the customers of Comfort Guard 365 days a year and 24 hours a day. The bulk of his cleaning work is done during the summer when customers' requests for cleaning and maintenance are passed on to him in the form of slips from Comfort Guard. Mr. Judges has some freedom in scheduling the time at which he performs the summer cleaning and maintenance function. A dispatcher employed by the respondent sends Mr. Judges to perform emergency service either by means of a telephone call to his home or by way of a two-way radio in his station wagon. The radio is paid for in part by the respondent and in part by Mr. Judges.

7. Mr. Judges owns his own tools and the station wagon which he uses as a service vehicle. All materials which he uses, with the exception of hand cleanser, belong to the respondent as do the parts which he installs. On the job he wears a Comfort Guard uniform which is provided by the respondent.

8. It is not practicable for Mr. Judges to tend to every service call within his geographic area at all times. Therefore the respondent has devised a system whereby other contract servicemen may cover for him when the need arises; when that work is done for a contract customer the work is charged back against the account of Mr. Judges.

9. The remuneration which Mr. Judges receives for account customers and charge customers is negotiated annually on his behalf by a committee of heating servicemen under contract to Comfort Guard. Mr. Judges and the committee that represent him have no direct input into the amount that Comfort Guard charges its customers either for parts or service.

10. There is evidence that Mr. Judges devotes parts of his time, when he is not working for Comfort Guard, to a gas heating business that he has recently undertaken in partnership with his son. In the past year the business operated in a small way providing gas heating service for barbecues and swimming pools; it does not perform work in competition with Comfort Guard nor does it interfere with Mr. Judges' work on behalf of the respondent. That "moonlighting" accounted for no more than 7% of Mr. Judges' income in the past year. He derived the remainder of his income entirely from Comfort Guard.

11. There is evidence that during the summer Mr. Judges employs his son to help him on cleaning and furnace maintenance jobs. His contract with Comfort Guard does not allow him to have work performed independently by his helper. Mr. Judges is himself responsible for all of the service assigned to him and in fact his helper does no more than attend with him on a service call and performs a role which is limited to providing help and which does not include doing the principal work. At times other than in the summer Mr. Judges will hire a single helper on an occasional basis. For the greater part of the year he works alone.

12. While it is arguable that Mr. Judges is an employee when measured against the

common law standards applied by the Board in cases predating the recent amendments to the Act it is, in our view, more appropriate to assess his status in light of the more flexible definition of dependent contractor that has been more recently incorporated into the Act. To the extent that the statutory definition of dependent contractor requires the Board to examine whether the relationship more closely resembles that of an employee than that of an independent contractor the common law tests still have some application. As the Board noted in *Adbo Contracting Limited* ([1977] OLRB Rep. April 197) the statutory definition of dependent contractor creates a new point of departure for determining who is to have access to collective bargaining. And as the Board observed in *Nelson Crushed Stone* ([1977] OLRB Rep. Feb. 104) when it is faced with a person whose working attributes are similar both to those of an employee and an independent contractor the Board must

“... make the determination by reference to the criteria set out in the statutory definition of dependent contractor. The definition directs the Board to examine the type of economic dependence and the kind of business relationship or obligation that it has before it, and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment and whether or not a person furnishes his own tools, vehicles, equipment or machinery. In the final balance the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than of an independent contractor.”

13. How is Mr. Judges to be viewed in the light of those criteria? It is apparent that Mr. Judges' income is substantially and directly dependent on the work which he performs for Comfort Guard. He services heating equipment at Comfort Guard's instruction, to Comfort Guard's customers using Comfort Guard's parts and materials. He is paid by cheque on a regular basis by Comfort Guard. While his remuneration is by a form of piecework he has no input into the rates which Comfort Guard charges its customers for parts or for service and in no real sense can those customers be said to be his. The source of both the work performed by Mr. Judges and the remuneration received by him is Comfort Guard and not the individual homeowner. That places him in a position of economic dependence similar to that of an employee.

14. Is the nature of the business relationship between Mr. Judges and Home Comfort analogous to that of employer-employee? Counsel for the respondent suggested that the employment of a helper placed Mr. Judges in closer similarity to an independent contractor. We are satisfied that the evidence of his use of a helper on a casual basis does not bring Mr. Judges within the ratio of the Board's decision in the *Canada Crushed Stone* case ([1977] OLRB Rep. Dec. 806) and thereby deprive him of status as a dependent contractor. In that case the Board found that an owner-operator of a truck engaged in hauling crushed stone who in fact owned 10 trucks and employed some 7 persons to operate them in a business doing about \$250,000.00 in business per year was, by virtue of the entrepreneurial nature of his undertaking, not a dependent contractor within the meaning of The Labour Relations Act. The finding that a person is engaged in an entrepreneurial endeavour is a qualitative determination that must depend on the facts of each particular case. This Board would disregard labour relations reality if it were to find that by the occasional use of a single helper to lighten his load Mr. Judges becomes an entrepreneur who is essentially engaged in using

and attempting to profit from the labour of others. When the "total character of the business" in which Mr. Judges is engaged is examined by the Board, including the use of a helper, he must be viewed as more closely resembling an employee than an independent contractor. On the evidence in this case Mr. Judges does not employ one or more persons on a regular basis, using a separate vehicle and separate tools owned by Mr. Judges to make separate service calls independently for Mr. Judges so that his chance of profit is substantially increased, as was the case in *Canada Crushed Stone*. On the whole Mr. Judges' use of a helper on a casual basis cannot be fairly described as an entrepreneurial endeavour.

15. This conclusion is consistent with decisions of the Board made before the amendment of the Act to provide collective bargaining for dependent contractors. In a number of cases the Board has found persons working under conditions similar to or identical with those of Mr. Judges to be employees (see *Automatic Fuels Limited* [1966] OLRB Rep. April 22; *Bermack Burner Service* [1969] OLRB Rep. Oct. 850; *Shell Canada Limited* [1974] OLRB Rep. April 200; *Gulf Oil Canada Limited* [1974] OLRB Rep. April 245).

16. When the totality of the relationship between Mr. Judges and Comfort Guard is considered the Board must conclude that Mr. Judges is a dependent contractor within the meaning of The Labour Relations Act. While the respondent does not exercise close physical supervision and control of his work it does, by virtue of its ability to terminate his contract, exercise the kind of economic control that makes Mr. Judges a part of its business. Comfort Guard can and does require Mr. Judges to carry \$500,000.00 in public liability insurance on his vehicle, it can and does require him to wear the uniform of a representative of Comfort Guard, and in dealing with the customers of Comfort Guard it can and does require him to conduct himself at all times as a competent and courteous representative of that company. In all of these circumstances the independent ownership of his vehicle and tools does little to alter the essential nature of his relationship which more closely resembles that of an employee than an independent contractor.

17. This matter is referred back to the Labour Relations Officer who is hereby authorized to complete the examination directed in the Board's decision of April 25, 1978.

DECISION OF BOARD MEMBER F. W. MURRAY:

I dissent for reasons to be given in writing at a later date.

0826-78-U Ontario Public Service Employees Union, (Complainant), v Fanshawe College of Applied Arts and Technology, (Respondent).

S-79 – Alleged breach of freeze provisions of Colleges Collective Bargaining Act – Employer revoking free parking privilege following notice to bargain – Parking privileges not part of previous collective agreement – No breach of statutory freeze established

Editors Note: The statutory provisions involved in this case should be compared to section 70 of the Labour Relations Act

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and E.C. Went.

APPEARANCES: *Ted Wohl, Frank Green, Michael Grunwell, Ross Rachar and Ronald J. Martin for the complainant; C.G. Riggs, B.R. Gatien, D.L. Busche and B.G. Gloin for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER E.C. WENT: October 13, 1978

1. This is a complaint brought before the Board under Section 78 of *The Colleges Collective Bargaining Act 1975* in which the complainant alleges that it has been dealt with by the respondent contrary to the provisions of Section 55(2) of *The Colleges Collective Bargaining Act 1975* (hereinafter referred to as the Act). The complaint is in respect of the decision of the respondent college to commence a system of paid parking when previously parking on campus by members of the bargaining unit was free of charge.

2. The parties to this matter were parties to a collective agreement which expired on August 31, 1977. Pursuant to Section 5 of the Act, notice to bargain for a renewal to the expired collective agreement was served and negotiations commenced for a renewal to the expired collective agreement. A successor agreement has not been concluded and the union has not served notice of its intention to strike under Section 60 of the Act. The college has not served the union with notice of its intent to lock out under Section 64 of the Act in respect of the negotiations for the renewal to the agreement which expired on August 31, 1977.

3. The Colleges Collective Bargaining Act came into existence on July 5, 1975. Since the time of its inception the college has never given written notice of a lockout to the union and the union has never given written notice of its intent to strike.

4. The evidence establishes that bargaining unit employees have enjoyed free parking since the 1960's. In April, 1977, the college advised the local union that it was considering instituting paid parking. The college, through Fanshawe Administrative Notice numbers 434 and 437, dated June 2nd and 3rd respectively, advised that effective September, 1978 a system of paid parking would be implemented. Although the paid parking system had not come into effect at the time this complaint was heard, the parties were agreed that the issue between them should be heard and a decision made by the Board as to whether the college was entitled under the Act to unilaterally institute a system of paid parking in September, 1978 when previously none had existed. The parties are agreed that the collective agreement does not address itself to the matter of parking – paid or free.

5. The relevant provisions of the statute are:

“55. (1) Where notice has been given by either party to an agreement under section 5, except as altered by an agreement in writing by the parties, the terms and provisions of the agreement then in operation shall continue to operate until there is a right to strike or lockout as provided in this Act.

(2) Where notice has been given by the employee organization under section 71, the conditions then in effect applicable to or binding upon the Council, the employer, the employee organization or the employees which are subject to negotiations within the meaning of this Act shall not be altered without the consent of the Council, the employer, the employee organization or the employees, as the case may be, until there is a right to strike or lock-out as provided in this Act.

5. (1) Either party to an agreement may give written notice to the other party within the month of January in the year in which the agreement expires of its desire to negotiate with the view to the renewal, with or without modification of the agreement then in operation.

(2) Where an agreement exists and no party to the agreement gives notice in accordance with this Act of its desire to negotiate with the view to the renewal of the agreement, the agreement continues in operation and is renewed from year to year, with each yearly period expiring on the 31st day of August, until the year, if any, in which notice is given in accordance with this Act of desire to negotiate with the view to the renewal with or without modification of the agreement.

71. Upon being granted bargaining rights under section 69, the employee organization may give the Council written notice of its desire to negotiate with a view to making an agreement."

6. The union argues that once notice has been given under Section 71 of the Act, which is the first notice given following the granting of bargaining rights under the Act, the statutory freeze created by Section 55 (2) of the Act continues in effect until such time as there is a right to strike or lockout as provided in the Act, and because free parking was a condition of employment at the time notice was given under Section 71 of the Act, and because free parking is an issue subject to negotiation under Section 4 of the Act, it follows that the Section 55(2) freeze remains in operation. The union takes the position that Section 55(1) and Section 55(2) are not mutually exclusive and, as in this case, can operate concurrently.

7. The argument of the employer, simply put, is that sections 55(1) and 55(2) are mutually exclusive and deal with two different situations. The section 55(2) freeze follows from notice under section 71 to negotiate a first agreement. The employer argues that the section 55(1) freeze follows from notice under section 5 to negotiate a renewal collective agreement and affects only the terms and provisions of the agreement then in operation. The employer takes the position that in this case the Section 55(1) freeze applies and not the Section 55(2) freeze and that it does not extend to cover free parking because it is agreed that free parking is not a term or provision of the agreement in operation at the time notice was served under Section 5 of the Act.

8. The Act provides for notice to bargain for a first agreement to be made under Section 71 and notice to bargain for a renewal agreement under Section 5 of the Act. Regardless of which section notice to bargain is served under, there is built into the Act, as part of the bargaining process, a statutory freeze period. If notice is given to negotiate a first

agreement the freeze covers the conditions then in effect which are subject to negotiation and if notice is given to negotiate a renewal agreement, the freeze covers the terms and conditions of the agreement then in effect. The freeze created by notice to bargain for a renewal agreement is restricted to the terms of the agreement and does not extend to all rights, privileges and duties as does the freeze created by notice to bargain for a renewal agreement under the Labour Relations Act. When the two sections are read together and viewed in light of the scheme of the Act, which is to bring about a collective agreement to govern the relationship of the parties during the term of its operation, it becomes clear that the statutory freeze, whether under Section 55(1) or 55(2), is part of the bargaining process and ends with the bargaining process unless it has been ended sooner by the attainment of the right to strike or lock-out. The Board must conclude, therefore, that sections 55(1) and 55(2) are mutually exclusive. The section 55(2) freeze comes into force and ends with the initial bargaining process and the section 55(1) freeze comes into force and ends with each subsequent process.

9. If the freeze imposed by Section 55(2) were to continue beyond the end of the initial bargaining process where the right to strike or lock out has not been attained, as is argued by the union, the result would not be in keeping with the scheme or purpose of the Act. Firstly, the freeze would extend into the period of operation of the collective agreement thereby effectively undermining the agreement in all areas where the parties had agreed to alter the pre notice to bargain status quo. The legislature could not have intended this result. Secondly, the literal interpretation urged by the union might result in one side or the other resorting to strike or lock-out in order to lift a long standing section 55(2) freeze. The Act establishes comprehensive mechanisms to facilitate the peaceful resolution of bargaining disputes and having done so it is highly unlikely that the legislature would have intended the section 55(2) freeze to continue indefinitely beyond the end of the initial bargaining process thereby giving rise to the possibility of one side or the other resorting to strike or lockout for the purpose of lifting the freeze; if we accept the interpretation urged by the union the section 55(2) freeze can be lifted in no other way. Finally, if the two freezes operate concurrently, a conflict might result if the terms of the agreement are different than the conditions of employment at the time notice was given to bargain for a first agreement. The result is inconsistent with the purpose of the freeze which is to facilitate the bargaining process by establishing a fixed point of departure and creating a climate conducive to negotiation.

10. Section 55(1) and Section 55(2) deal with different situations as is apparent from the language used to describe the freeze in each section, and are mutually exclusive in their operation as is evident from a reading of the Act as a whole. The interpretation urged by the union would do fundamental violence to the scheme and purpose of the Act and is rejected by the Board.

11. The Section 55(1) freeze was in effect at the time the college served notice of its intent to institute a system of paid parking. The parties are agreed that parking is not covered by the terms of the agreement and is not caught by the Section 55(1) freeze. Accordingly, this complaint is hereby dismissed.

DECISION OF BOARD MEMBER D.B. ARCHER:

1. I agree with the facts as spelled out in the majority decision. I do not believe you

can find such a clear distinction between section 55(1) or (2) or that they are mutually exclusive.

2. One must give a liberal interpretation to the Act in order to give the relief sought and to carry out the meaning of the Act.

3. The interpretation suggested by the majority would allow the company to make any changes they desire and the union is powerless to complain and is unable to take any action to protest the unilateral implementation of changes that are most important to the membership.

4. Certainly parking could be a matter of collective bargaining, therefore, they cannot be changed except by mutual consent.

5. There are areas that are not negotiable, more so I suppose, in Educational Institutions than in some other areas. However, it is not the purpose of the legislation to allow management a unilateral right to change working conditions that would affect the union's collective bargaining position. I would, therefore, allow the union's complaint and send the matter to the bargaining table where it properly belongs.

0995-77-R Labourers' International Union of North America, Local 183, (Applicant), v **Gazzola Paving Limited**, (Respondent), **International Union of Operating Engineers, Local 793**, (Intervener).

Certification – Bargaining Unit – Construction Industry – Discussion of Board practices concerning certification by sector or with reference to the work jurisdiction of applicant union

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

APPEARANCES: *T. Kuttner and T. Connolly for the applicant; W. J. McNaughton and M. Gazzola for the respondent; no one for the intervener.*

DECISION OF THE BOARD; October 6, 1978

1 This is an application for certification filed pursuant to the construction industry provisions of The Labour Relations Act. At the hearing into the matter held on July 31, 1978, the Board orally dismissed the application. What follows are the reasons for the dismissal.

2. The respondent is a firm engaged in the paving and repair of roads and parking lots. On the date of the making of the application its employees were engaged on a number of projects in Board Area #8, including the rebuilding of sections of University Avenue for the Municipality of Metropolitan Toronto, the performing of certain road patching work for the City of Toronto, the paving of a parking lot for a private firm and the re-paving of a

bridge and 150 feet of road on either side of the bridge on highway 10 in Brampton. In all, the respondent had some 43 construction labourers in its employ in Board Area #8 on the date of the application.

3. The Board's general practice in applications such as this is to define the bargaining unit in terms of all construction labourers employed on building projects. In the instant case the applicant requested that the bargaining unit be described either in terms of all construction labourers engaged in the construction of bridges or, in the alternative, in terms of construction labourers engaged in the heavy engineering sector of the construction industry. It was the contention of the applicant that using either description, the bargaining unit on the date of the application would have included three construction labourers doing re-paving work on and near the bridge on Highway 10.

4. The three men who were working on the bridge and its approaches are not assigned exclusively to bridge work, but rather, as with the respondent's other employees, they are moved about between different jobs as required. There is nothing before the Board to indicate that the work being done in connection with the bridge was substantially different from the type of work normally performed by the respondent's employees.

5. In the construction industry, the Board generally does not describe bargaining units by reference either to a particular type of work or to a specific sector. See: *Acadian Engineering Limited*, [1970] OLRB Rep. Dec. 986 and also *Eilpro Holdings Inc.*, [1973] OLRB Rep. March 16. The major departure from this practice occurs in Board Area #8 and involves the applicant and its sister local 506. Where either of these two locals are involved, the Board generally does describe bargaining units in terms of construction labourers employed on non-residential building projects, residential building projects, and those not engaged on building projects at all. These distinctions are recognized by the Board not because of the differing nature of the work involved, but rather because they follow the division of internal jurisdiction between the two locals as determined by the Labourers' International Union of North America. See: *Peniche Construction Forming*, [1974] OLRB Rep. April 208. As already indicated, where, as here, the work involved is other than on building projects, the Board generally describes the bargaining unit in terms of all construction labourers in Board Area #8 except for construction labourers employed on building projects.

6. The Board will depart from its normal construction industry bargaining unit descriptions where so warranted by the particular facts involved. See, for example, *Malen Steel & Salvage Company Limited*, [1978] OLRB Rep. May 435. In the instant case, however, we are not satisfied that the facts involved warrant any departure from the bargaining unit description generally adopted by the Board. Indeed, to the contrary, we are of the view that to grant the unit requested would serve to unduly fragment the respondent's work force and would not be conducive to sound industrial relations.

7. Having regard to the above, the Board indicated to the parties at the hearing that the appropriate bargaining unit should be described in terms of all construction labourers, except construction labourers employed on building projects, in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. In that the applicant filed evidence of membership on behalf of

less than forty-five per cent of the employees in such a bargaining unit, the Board dismissed the application.

8. The Board hereby affirms its oral decision dismissing this application.
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1935-77-R United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant), v **Farquhar Construction Limited**, Port-A-Room Manufacturing Limited and Enterprize Investments Limited, (Respondents), v Group of Employees of Port-A-Room Manufacturing Limited, (Objectors).

Related Employer – Collective Agreement – Bargaining Rights – Employer establishing related nonunion company in order to reduce wage costs and bid on nonunion jobs against nonunion competition – Union aware of second related company for several years – Board declining to make 1(4) declaration because of passage of time – Also held that the payment of wages in one operation in accordance with a collective agreement covering another, does not, of itself create bargaining rights for the first operation

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Harold F. Caley and Ernest LeBlond for the applicant; Edward T. McDermott for the respondent; Derek L. Rogers for the objectors.*

DECISION OF THE BOARD; October 19, 1978

1. The applicant has applied to the Board for a declaration that the three corporate respondents are one employer within the meaning of section 1(4) of The Labour Relations Act.

2. Since its incorporation in 1952, Farquhar Construction Limited (Farquhar) has carried on business as a general building contractor in the North Bay and Sudbury areas. In 1955 the applicant was certified as bargaining agent for the employees then in its employ. Farquhar subsequently entered into a series of collective agreements with the applicant, the last of which expired April 30, 1978. Farquhar has also had a number of collective agreements with the Sudbury local of the carpenters union.

3. In 1966, Farquhar commenced to manufacture and assemble mobile building units (schools and commercial buildings). This business, which was carried on by Farquhar until December of 1977, was carried on from a shop on Harriett Street located behind the Farquhar head office in North Bay. During the period of its operation under Farquhar, the "Port-A-Room" shop, as it was then known, employed members of the applicant (as many as ten) to perform the various functions involved in the production process – assembly of wall components, painting, welding, carpentry and general labour work, etc. These employees, all of whom were hired through the applicant, were paid the wage rates specified in the collective agreement. Apparently this practice was followed so that the employees who

moved back and forth between the shop and the employer's construction projects would not be at a financial disadvantage when working in the shop which already suffered from cramped conditions and a lack of proper manufacturing equipment.

4. In 1975, Enterprize Investments Limited (Enterprize), which had been incorporated in 1974, commenced operations as a general building contractor; its first job was in Sudbury. By 1976, Enterprize had obtained work in the North Bay area, and by the summer of 1977, it was actively engaged on three high profile projects – the federal building in North Bay, the City of North Bay maintenance garage and the Callander fire hall. Farquhar was used by Enterprize as a sub-contractor on all of these jobs – to perform certain specialty work (e.g. trimming of windows). This work was done pursuant to the collective agreement by a member of the applicant. The evidence is that the two corporations which share common supervision together with the same office, accounting, bookkeeping and telephone answering services, have maintained separate work forces as well as separate payrolls, books, bank accounts, etc.

5. The reason for Enterprize's incorporation is clear. Enterprize was incorporated to allow John Farquhar, its sole director, officer and shareholder to submit bids on jobs (and thus obtain contracts) based on rates lower than those specified in the collective agreement between Farquhar and the applicant. Mr. Farquhar, who is also president, manager, director and majority shareholder of Farquhar, gave evidence that it has become increasingly difficult in recent years for a unionized company to obtain work in the North Bay area and that in order to compete for the non-union jobs, which are now almost the only jobs available, it is necessary to have a non-union company. The evidence is that Farquhar's general contracting work, which began declining four or five years ago, had fallen off dramatically by 1976. Farquhar obtained only one or two jobs in 1977 and none in 1978. This, despite the fact that it continued to tender on many projects.

6. Mr. Farquhar testified that he had made no secret of the fact that he was operating with two companies and that he had informed the applicant on several occasions of jobs that had been awarded to non-union firms. His evidence, which was not contradicted, was that no one from the applicant had complained about his operating in a "double-breasted" fashion prior to seeking relief from the Board. The application was filed March 17, 1978.

7. In December of 1977, Farquhar ceased to manufacture mobile building units and terminated the two employees – both members of the applicant – employed in its Harriett Street shop. In February of 1978, Port-A-Room Manufacturing Limited, which had been incorporated in November of 1976, commenced production of mobile building units from a newly constructed facility in Powassan twelve miles from North Bay. Port-A-Room Manufacturing, which is operated under the control and direction of John Farquhar, its president and majority shareholder, uses the trade name "Port-A-Room". This name was transferred from Farquhar without consideration, as were some of the complete mobile units, raw materials and equipment. Although the finished product remains the same, the process of production under the new company has been streamlined; it now makes use of a jig table for fabrication and an overhead crane. It is hoped that this improved manner of production, together with the lower wage rates now paid to employees will allow Mr. Farquhar to compete with other manufacturers for the mobile building unit market – something which he was unable to do from the Harriett Street facility. The eight employees presently employed at Powassan received rates 50% below the rates specified in the collective agreement between Farquhar and the applicant.

8. In March of 1978, the applicant brought this application pursuant to section 1(4), and in the case of Port-A-Room Manufacturing Limited, pursuant also to section 55. The applicant is seeking a declaration that the three corporate respondents are one employer and a declaration that the applicant is the bargaining agent for the employees of Port-A-Room Manufacturing Limited. No doubt in recognition of the manufacturing nature of the business of Port-A-Room Manufacturing, the respondent is not seeking to bind that company to a construction industry collective agreement. Moreover, insofar as Enterprize is concerned, the applicant is content for the Board to confine its grant of section 1(4) relief to the date of application. This, it says, will result in bargaining rights being acquired for Enterprize which will then fall within the purview of the current provincial bargaining.

9. Section 1(4) allows the Board to pierce the corporate veil in circumstances where associated or related enterprises are carried on under common control or direction. It states:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

10. A significant principle underlying both section 1(4) and section 55 is that a union should not have its bargaining rights diluted by the decision of an employer to conduct a part or all of its business through a separate non-union corporation (see, *Inducon Construction of Canada* [1975] OLRB Rep. April 400.) Such a decision quite often involves the transfer of employees from the union to the non-union corporation – the situation referred to in (*Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029.) The employer may decide, however, to hire new employees to perform work which was previously done by its unionized employees. In such circumstances, the principle underlying section 1(4) normally requires that the bargaining rights of the union be applied to the new corporation. The Board does not consider that section 1(4) was intended to be limited to situations involving a transfer of employees, as was argued by counsel for the respondents. It is sufficient that the business of the employer be directed from the unionized corporation to the non-unionized so as to effectively undermine the bargaining rights of the union (for a recent statement to this effect, see *United Brotherhood of Carpenters and Joiners of America, Local 2486, and Steds Limited and Stedsteel Buildings*, September 8, 1978 Board File No. 0776-78-R.)

11. There is no doubt, on the evidence, that Farquhar and Enterprize, which are carrying on business as general contractors in the construction industry, are being operated under common control and direction – namely the control and direction of their president and sole shareholder, John Farquhar. The question remains, however, whether the two corporations should be treated as one employer for purposes of the Act. The application of section 1(4) is not automatic upon a finding that the statutory prerequisites have been satisfied. The Board has a discretion, which it has exercised, to decline to grant section 1(4) relief where it is of the view that such relief would be inappropriate in the circumstances. The Board has

indicated that one of the factors it will consider in deciding whether to exercise its discretion under section 1(4) is that of delay.

12. In support of his contention that the delay in this case should be considered fatal to the union's application, counsel for the respondents pointed to the high profile character of the projects undertaken by Enterprize and to the fact that these projects were undertaken in an environment increasingly hostile to collective bargaining. Counsel also noted that there had been discussions between the parties leaving no doubt as to the applicant's state of awareness. Counsel for the applicant, on the other hand, pointed out that there has been no detrimental reliance on the part of the employer (it was emphasized that the applicant is not seeking retrospective relief) and that there are no intervening bargaining rights or competing unions. In such circumstances, there is no reason, counsel says, to disentitle the applicant to relief.

13. In emphasizing the importance of a trade union acting promptly – when confronted with a multi-entity situation – the Board's concern is not simply to avoid the situation where bargaining rights may be acquired by another trade union – the concern expressed in *Industrial Mine*. Because the application of section 1(4) may involve an accretion to an existing bargaining unit, the Board has been increasingly concerned to avoid imposing bargaining rights on employees who may desire to remain unrepresented, or perhaps to be represented by another trade union. Where a union moves to protect its bargaining rights with dispatch, the need for stability in collective bargaining must take precedence over the wishes of the new employees. In such circumstances, the position of the new employees may be likened to that of employees hired as a result of a post-certification build-up of an employer's work force. They may not wish collective bargaining; but that is the structure which has been established to govern their employment relations – at least until such time as an application for termination becomes timely. Where, however, a union chooses to sleep on its bargaining rights and allows an employer to carry on with an unorganized workforce, the rights of the unorganized employees must be given consideration. This approach to the application of section 1(4) can be seen in *Zaph Construction Ltd.* [1976] OLRB Rep. Nov. 741 where the Board refused to use section 1(4) to establish a contract bar in a situation where the party requesting it had left bargaining rights exposed, and more recently in *Ellwall and Sons Construction Limited* [1978] OLRB Rep. June where the Board declined, on the ground of delay, to exercise its discretionary power. (See also *Inducon Construction*).

14. The Board recognizes that the erosion of a union's bargaining rights may occur gradually and that there will be cases where the erosion is not immediately apparent. For that reason, we will be careful to avoid imposing upon applicants a standard of diligence which is unduly onerous. Where, however, a union does not seek relief within a reasonable period from the time at which it becomes (or ought reasonably to have become) aware that its bargaining rights are being eroded, the Board will decline to exercise its discretion and will insist that it proceed by way of the normal certification procedures.

15. There can be no doubt that the union in this case has not acted with reasonable dispatch. The evidence indicates that the applicant knew of the activities of Enterprize in the North Bay area by the summer of 1977, if not before. The applicant did not, however, seek relief from the Board until March of this year. Whether this was because it was prepared initially to allow Enterprize to operate outside of the framework of its collective agreement with Farquhar, as argued by counsel for the employer, or whether it was through

simple ignorance of the need to act promptly, the fact is that the applicant is now seeking to assert bargaining rights in respect of a group of employees who have been unrepresented for a period of some two years. In these circumstances, the Board has concluded that it would not be a sound exercise of its discretion to treat the two corporations as one. If the union wishes bargaining rights for the employees of Enterprize, it must proceed by way of the normal certification procedures.

16. The converse to the principle that the bargaining rights of a union should be protected from erosion by employer manipulation of the corporate form is that the appearance of a new corporate entity should not be the occasion for an expansion of bargaining rights into a previously unrepresented area. That is, without a showing by the applicant that it has the support of a majority of the employees in the new grouping. If the Board were to use section 1(4) or section 55 so as to confer upon a union bargaining rights which it did not previously possess (or which it had long since abandoned) it would be ignoring the fundamental policy – stated in the preamble to the Act and reflected in section 3 – that collective bargaining is to be between employers and unions as the freely designated representatives of employees. For that reason, the Board has consistently held that the relief available under section 1(4) and section 55 is not to be sought as a substitute for obtaining bargaining rights through normal certification procedures. (See, most recently, *D.L. Stephens Contracting Niagara and Stephens and Bass Limited*, [1978] OLRB Rep. June and *Bryant Press Ltd.*, [1972] OLRB Rep. Apr. 301.)

17. It is clear that the work which was formerly performed by Farquhar as a part of its total business, and which is now being done by Port-A-Room Manufacturing as its sole operation – namely the manufacture and assembly of mobile building units from an off site shop – is not “construction work” within the meaning of The Labour Relations Act. It is clear, moreover, that the last collective agreement between the applicant and Farquhar is not the type of agreement which covers both construction and non-construction work. The collective agreement, which is based on the terms of the Sudbury Construction Association’s contract with the Carpenters Union – is not an all-employee collective agreement as, the Board was informed, is the case with all collective agreements involving mobile home manufacturers in the province. The agreement, which applies only to carpenters is restricted, by its terms, to construction work where the employer performs work on “jobs or projects” i.e. on site construction work. This comes clear from an examination of the recognition clause and from an examination of the agreement as a whole. In short, the language of the agreement does not allow the Board to infer that the parties intended it to cover manufacturing work of the type done in the Port-A-Room shop. It may be, as was suggested in argument, that the applicant was proceeding on the assumption that the agreement had been extended by the long-standing practice of the employer (although it is to be noted that the applicant did not produce witnesses to so testify). But that assumption, if it existed, was without legal foundation.

18. As was stated in *Zaph*, the extending of benefits contained in a collective agreement is quite common in the construction industry and does not thereby confer bargaining rights. Under the Labour Relations Act, bargaining rights may be acquired in two and only two ways – certification by the Board and voluntary recognition by the employer. It was not suggested that the certificate issued to the applicant in 1955 covered manufacturing work. In any event, that certificate has been supplanted by the parties’ collective agreements (see, in this regard *Graphic Centre (Ontario) Inc.* [1977] OLRB Rep. 379) Even if the Board had

before it evidence that Farquhar had complied fully with the terms of those collective agreements when operating its Harriett Street shop (the evidence establishes only that the agreements were used as a basis for hiring and for the establishment of employee wages) that would not, as was recognized by counsel for the applicant, have amounted to voluntary recognition within the meaning of the Act. The evidence is that Farquhar never signed and was never asked to sign an agreement in respect of the Port-A-Room shop. As stated above, the Board is unable to construe the collective agreement as covering, by its terms, the work there performed.

19. It follows from the foregoing that the grant to the applicant of section 1(4) or section 55 relief would have the effect of conferring upon it bargaining rights – the right to represent employees engaged in the manufacture and assembly of mobile building units – which it did not possess at the time of Port-A-Room’s incorporation. That being the case, the Board finds that the applicant is not entitled to the relief sought. The Board finds that the manufacturing portion of Farquhar’s business was not covered by the last collective agreement between Farquhar and the applicant and that, accordingly, there has not been a sale of business within the meaning of section 55. Because the applicant did not hold bargaining rights for the employees of Farquhar when they were engaged in the manufacture and assembly of mobile building units, the Board finds that Port-A-Room Manufacturing Limited and Farquhar Construction Limited should not be treated as one employer for purposes of the Act.

20. The application is therefore dismissed.

918-78-M; 0877-78-U Kenneth R. Green, carrying on business as **Green’s Ambulance**, (Employer), v The London and District Service Workers’ Union Local 220, S.E.I.U., AFL CIO CLC, (Trade Union).

Reference – Whether employer running private ambulance service subject to Hospital Labour Disputes Arbitration Act – Employer refusing to comply with interest arbitration award made pursuant to H.L.D.A.A. – Award held not binding because employer not covered by hospital legislation

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and W.H. Wightman.

APPEARANCES: *Chris G. Paliare and Paul Middleton for the complainant/trade union; Thomas A. Cline, Q.C., B.R. Baldwin and Wayne Green for the respondent/employer.*

DECISION OF THE BOARD; October 30, 1978

1. The name “Kenneth R. Green, carrying on business as Green’s Ambulance” appearing in the style of cause in Board File No. 0877-78-U as the name of the respondent is amended to read: “Kenneth R. Green.”

2. The Board has before it a reference from the Minister under section 96 of the Act

in which the question as to whether the Minister has authority under The Labour Relations Act to appoint persons to constitute a Board of Arbitration is asked. In addition the Board has before it a complaint filed under Section 79 of the Act in which the complainant union alleges that the respondent ambulance service has acted contrary to the provisions of sections 14, 56, 58 and 61 of The Labour Relations Act. The Board hereby directs that the above matters be and the same are hereby consolidated.

3. The parties agreed on a number of the relevant facts and these are set out below:

(1) On February 2, 1977, the complainant was certified by the Ontario Labour Relations Board as the exclusive bargaining agent for all employees of Kenneth R. Green carrying on business as Green's Ambulance in Simcoe, Ontario (see Board File numbers 1529-76-R and 1530-76-R, which files were consolidated by Order of the Board).

(2) Collective bargaining for a first collective agreement followed Notice to Bargain which was given by the Union to the employer. Meetings were conducted by the Complainant and the Respondent on March 3, April 5 and April 21, 1977, in an effort to effect a collective agreement.

(3) Since the parties were unable to agree upon the terms of a collective agreement, on July 12, 1977, the Union filed with the Board a request for the appointment of a conciliation officer.

(4) In an undated letter, received by the Complainant on August 30, 1977, the Minister appointed Mr. de G. Loranger as the conciliation officer. The conciliation officer met with the parties on September 12 and 13, 1977.

(5) In a letter dated September 20, 1977, the Complainant was informed by the Minister of Labour that the conciliation officer had been unable to effect a collective agreement.

(6) In a letter dated September 22, 1977, the Complainant wrote to Mr. Thomas A. Cline, solicitor for the Respondent, advising him of the Complainant's nominee to a Board of Arbitration.

(7) On September 28, 1977, Mr. Cline wrote to Mr. Middleton, a Union representative, advising of the employer's nominee to the Board of Arbitration.

(8) In a letter dated November 1, 1977, Ms. D.M. Johnson, acting Registrar at the Ontario Labour Management Arbitration Commission, wrote to the parties and advised them of the date, time and place for the hearing of the interest arbitration. At that point in time, it was the understanding of both parties that this interest dispute was being conducted pursuant to *The Hospital Labour Disputes Act*. Both parties had been advised by Mr. de G. Loranger during the course of the conciliation proceedings that if a settlement was not forthcoming as a result of his efforts with the parties, then the matter would be arbitrated pursuant to the provisions of the *Hospital Labour Disputes Act*.

(9) On February 3, 1978, the Board of Arbitration convened its hearing and the parties and their representatives appeared and representations were made. The Board reserved its decision.

At that hearing, no representations were made by the respondent that the Board did not have jurisdiction to conduct its inquiry and resolve the matters in dispute. The respondent was following instructions directed to him by the conciliation officer.

(10) On May 10, 1978, the Board of Arbitration released its award dated April 29, 1978.

(11) On May 30, 1978, Mr. Middleton wrote to Mr. Cline and enclosed a draft copy of a collective agreement in which he incorporated the award of the Board of Arbitration.

(12) Since Mr. Middleton did not receive a reply to the letter of May 30, he then wrote to Mr. H.D. Brown, Chairman of the Board of Arbitration requesting that the Board order the collective agreement into effect.

(13) Pursuant to Mr. Middleton's letter of June 8, Mr. Brown wrote to Mr. Cline requesting his comments.

(14) On June 16, 1978, Mr. Cline called Mr. Middleton by telephone and told him that the employer was willing to sign the draft collective agreement that had been submitted on May 30, but there were a few minor changes that had to be made. Mr. Middleton agreed with the changes which were proposed by Mr. Cline. Mr. Middleton then sent new collective agreements to Mr. Cline on June 16, incorporating the changes that had been agreed to on that day.

(15) The Complainant and Respondent had agreed that they would meet on July 7 to officially sign the agreement that had been reached on June 16. This was agreed to in the telephone conversation of June 16.

(16) On the evening of July 6, 1978, Mr. Cline called Mr. Middleton at his home and advised Mr. Middleton that the employer would not sign the collective agreement at the meeting scheduled for the following day.

(17) On July 7, Mr. Middleton met with Mr. Cline and Mr. Cline again advised Mr. Middleton that the position of the employer was that the collective agreement was null and void and would not be signed by the employer.

(18) In a letter dated July 7, Mr. Brown wrote to Mr. Cline, a copy of this letter is enclosed.

(19) Also on July 7, 1978, Messrs. Brown and Cline wrote to each other which letters clearly crossed in the mail (copies of these letters are enclosed).

(20) In a letter dated July 11, 1978, Mr. Brown wrote to Mr. Middleton

wherein he indicated he had had certain discussions with Mr. Cline. The changes referred to in that letter were the matters agreed to between the parties in their discussion on June 16 and those changes were incorporated into the agreement which was sent to the employer on June 16.

(21) The employer has continued to refuse to enter into a collective agreement and refuses to deal with any grievances pursuant to the terms of Mr. Brown's award. Moreover, the employer has continued to refuse to impose any of the terms and conditions which are set out in the collective agreement referred to.

4. The following facts were also agreed by the parties –

- The employer attended at and fully participated in the arbitration hearing and made both oral and written submissions.
- The employer never raised any objection to the jurisdiction of the arbitration board during the arbitration process. The employer's first objection to the jurisdiction of the Board was made the evening of July 6th.

5. Counsel for the employer read a statement to the Board which, it was agreed by the parties, should be received as evidence. The relevant facts contained in the statement are set out below:

- after Mr. Brown's award was handed down it was forwarded by Mr. Green to Mr. Crabtree (Administrator of Hamilton General Hospital) for purposes of submitting the award to the A.I.B.
- This ambulance service is fully funded by the Ministry of Health. Mr. Green is paid a salary. Budget surpluses are returned to the Ministry of Health.
- After the award came down the Ministry of Health was vitally concerned because funding to implement the award had to come from the Ministry. Mr. Green was instructed by his counsel to attend at a meeting with Ministry officials to arrange for funding.
- The meeting with the Ministry of Health officials took place on July 6th at 3:00 p.m. Counsel for the employer received a telephone call from Mr. Green who advised him that he had been advised by the legal department of the Ministry of Health that the arbitration award was made without jurisdiction because the *Hospital Labour Disputes Act* had no application to his ambulance service and further that the Ministry would not be responsible for funding the award.
- Counsel for the employer called the Ministry of Health and was told that the Ministry of Health considered the award null and void.
- Counsel for the employer contacted Mr. Middleton (union representative)

the next day, July 7th and explained to him that in the circumstances his client would be unable to execute the agreement on July 7th. Both Mr. Middleton and counsel for the employer were upset and decided they would try to keep the July 7th deadline. The employer took the position that if it got approval from the Ministry of Health it would keep the date to sign the agreement. As late as the day before the hearing, however, the Ministry of Health had not agreed to provide the funds necessary to cover the cost of implementing the award.

6. Mr. Jeff Steward, a driver/attendant who has been employed by Green's Ambulance Service for 3 years was called to give evidence. He holds a certificate as a Registered Nursing Attendant although R.N.A. qualifications are not necessary to hold the position of driver/attendant. He also holds the Camp Borden Certificate in ambulance attendance work which is required of the full-time driver/attendants employed by Green's. He testified that his responsibility when called out is "to observe and assess the patient and then care and treat the patient until we can get them to more qualified medical personnel." He testified that he makes his assessment on the basis of questions put to the patient and that the care given may include positioning of the patient, the administering of oxygen, the application of dressings, splints or cervical collars. He testified that he may be required to perform cardiac pulmonary resuscitation or to ventilate a patient if his vital signs are absent (V.S.A.). He answered in the affirmative when asked in cross-examination if his basic function was to convey sick or injured persons to the nearest hospital facility as safely as possible.

7. The Board also heard evidence from Mr. R.B. Baldwin, who acts as counsel in labour relations matters to a number of private ambulance services similar to Green's which are not operated out of a hospital or operated directly by the Ministry of Health. His evidence establishes that these other private ambulance services carry on their collective bargaining under the provisions of The Labour Relations Act and not the Hospital Labour Disputes Arbitration Act.

8. The union advanced a number of alternative arguments in support of its position that the Board should reply in the affirmative to the question asked by the Minister. The union takes the position that there is a collective agreement in operation by virtue of the provisions of the Hospital Labour Disputes Arbitration Act. The union argues that the Board does not have to determine if the Act applies to these parties as the Minister has already made the determination that they are under the Hospital Labour Disputes Arbitration Act. The union relies on the September 20th letter from Mr. Armstrong (Deputy Minister) to Mr. Middleton in which no reference is made of the decision of the Minister in respect of referring the matter to a conciliation board under the Labour Relations Act as would be the case if the matter fell within the ambit of the Ontario Labour Relations Act. In addition, the union relies on the fact that the arbitration process was sanctioned by the Ontario Labour Management Arbitration Commission. Counsel for the union argues that in these circumstances the matter is *res judicata*. The union argues in the alternative that if the matter is not *res judicata*, then the Board should interpret the term "hospital" as defined in the Hospital Labour Disputes Arbitration Act so as to include a private ambulance service such as Green's. The union argues that the word, institution, as it appears in the statutory definition of "hospital" is broad enough to encompass any business which has a service function to it and that Green's Ambulance Service is such a business which, on the evidence, must be

found to be operated for the care, observation or treatment of injured or sick persons so as to be a "hospital" within the meaning of the Hospital Labour Disputes Arbitration Act. The union argued, thirdly, and in the alternative that if the matter is not *res judicata* and if Green's Ambulance Service is not a "hospital" within the meaning of the Hospital Labour Disputes Arbitration Act, then it must be found on the evidence that the parties have agreed in writing to submit their differences to arbitration and in so doing have brought themselves within the ambit of Section 34(c) of The Labour Relations Act. The union relies on the letter from Mr. Middleton to Mr. Cline (counsel for the employer) dated September 22, 1977 and the reply from Mr. Cline dated September 28, 1977 in which the parties name their nominees to the arbitration Board. In addition, the union relies on the failure of the employer to challenge the jurisdiction of the arbitration board to hear and determine the matter put before it. The union maintains that the employer has attorned to the jurisdiction of the Board of arbitration. Finally, and in the alternative, the union urges the Board to find on the evidence that a collective agreement existed as of June 16, 1978, the day Mr. Cline called Mr. Middleton by telephone and told him that the employer was willing to sign the draft collective agreement that had been submitted on May 30th with a few minor changes which were agreed to by Mr. Middleton on behalf of the union. The union characterizes the failure of the employer to sign the collective agreement as a violation of section 14 of the Act and asks the Board to order the employer to sign the agreement as it did in *re Municipality of Casimir Jennings & Appleby*, [1978] OLRB Rep. June 507. Counsel for the union argued that if the Board accepts any of its alternative positions it must find that a collective agreement exists between the parties and reply in the affirmative to the question put to it by the Minister.

9. The union asks the Board to find that the conduct of the employer, when viewed in its entirety, constitutes an attempt by the employer to coerce its employees, to warn its employees with respect to management's view of the trade union and to deny its employees their rights under the Act. The union asks the Board to find that the conduct of the respondent as established in evidence is in violation of Sections 56, 58 and 61 of The Labour Relations Act.

10. The union's argument that the matter is *res judicata* is not accepted. *Res judicata* is the term used to describe the legal rule which stipulates that where the issue directly in dispute between the parties has already been adjudicated upon by a competent court it cannot be litigated again. Decisions taken by the Minister under the authority vested in him under the Labour Relations Act do not bring into play the doctrine of *res judicata*. The Minister is free to refer to the Board under Section 96 of the Act any question that may arise that, in his opinion, relates to his authority to make an appointment under the Act. He is free to do so regardless of his prior decisions or appointments and the Board is required to report to the Minister its decision on the question referred.

11. If we find Green's Ambulance Service to be a Hospital within the meaning of the Hospital Labour Disputes Act, then clearly the arbitration board established under the Act to adjudicate upon the issues in dispute between these parties acted within its jurisdiction when it conducted its hearings and handed down its award. The Hospital Labour Disputes Act requires the parties to execute a document in the form of a collective agreement giving effect to the award of a Board of Arbitration, failing which the document comes into effect by statute as though it had been executed by the parties and thereupon, constitutes a collective agreement. If we find Green's Ambulance Service to be a Hospital within the meaning

of the Hospital Labour Disputes Arbitration Act, then we must also find, notwithstanding the failure of the parties to execute a document giving effect to the Board's award, that they are parties to a collective agreement by virtue of the provisions of Section 7(7) of the Hospital Labour Disputes Arbitration Act. If, however, we find Green's not to be a hospital within the meaning of the Hospital Labour Disputes Arbitration Act, then we must also find that the employees of Green's are not "hospital employees" subject to and governed by the Hospital Labour Disputes Arbitration Act in their collective bargaining. If Green's is not a "hospital", then the Board of Arbitration which was established to deal with the dispute between these parties was without jurisdiction.

12. The courts, in reviewing the decision of inferior tribunals, have developed the rule that a lack of jurisdiction cannot be cured by the consent, waiver or acquiescence of the person over whom the purported jurisdiction is exercised. Jurisdiction cannot be conferred upon a court or statutory tribunal such as an arbitration board constituted under the Hospital Labour Disputes Arbitration Act, merely by agreement, acquiescence, or a failure to object to jurisdiction. (See de Smith, *Judicial Review of Administrative Action* 3rd ed., pg. 132, 372; Mullen, *Administrative Law*, pg. 3-124 and the cases cited therein especially re *Rosenfeld and College of Physicians and Surgeons* (1970) 2 OR 438 (HCL).) If, therefore, it is found that Green's is not a "Hospital" within the meaning of the Hospital Labour Disputes Arbitration Act, the failure of the company to challenge the jurisdiction of the Board of Arbitration constituted under that Act to adjudicate upon the differences between the parties does not confer or create jurisdiction. If Green's is not a "Hospital" within the meaning of the Hospital Labour Disputes Arbitration Act, then it must be found that the Board of Arbitration constituted pursuant to the provisions of that Act was without jurisdiction from the outset and that its award is a nullity.

13. "Hospital" and "hospital employee" are defined in the Hospital Labour Dispute Arbitration Act as follows:

"1.(1)(aa) 'hospital' means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

1.(1)(b) 'hospital employee' means a person employed in the operation of a hospital;"

Section 2(1) of the Hospital Labour Disputes Arbitration Act limits the application of the Act "to any hospital employees to whom The Labour Relations Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees and to the employers of such employees."

14. The definition of "hospital" as set out in the Act encompasses any "hospital, sanitarium, sanatorium, nursing home or other institution" which is operated for the observation, care or treatment of the sick or ill. While the phrase "other institution" when read in the abstract may be broad enough to include a private ambulance service, we are of the view, having regard to the use of the conjunctive and the *ejusdem generis* rule of construction – that is – that general words may be restricted to the same genus as the spec-

ific words which precede them, that a private ambulance service is not an “institution” within the meaning of the definition. Even if Green’s Ambulance Service could be brought within the first element of the definition, however, it does not satisfy the second and purposive element. An “ambulance service” is defined in section 1(b) of *The Ambulance Act*, R.S.O. 1970 as follows:

“ ‘ambulance service’ means a service held out to the public as available for the conveyance of persons requiring medical attention or under medical care, and includes the service of dispatching ambulances;”

The legislature has been careful to circumscribe the function of an ambulance service operated under the Act, as is Green’s, to the “conveyance of persons requiring medical attention or under medical care.” An “ambulance service” operated under *The Ambulance Act* is not operated for the “observation, care or treatment of persons ...” Although the driver/attendants at Green’s may from time to time attend, assist or render first aid or emergency medical care, these duties are incidental to the conveyance function of the ambulance service and do not bring the ambulance service within the definition of “hospital” as set out in section 1.1(aa) of the Hospital Labour Disputes Arbitration Act. Green’s Ambulance Service is not a “hospital” within the meaning of the Hospital Labour Disputes Arbitration Act. This result is consistent with the historical practice of private ambulance services and trade unions to conduct their collective bargaining under The Labour Relations Act and not under the Hospital Labour Disputes Arbitration Act. In the result the Arbitration Board constituted under the Hospital Labour Disputes Arbitration Act to adjudicate upon the collective bargaining issues in dispute between the parties acted without jurisdiction and its award is a nullity which cannot give rise to a collective agreement under the provisions of the Hospital Labour Disputes Arbitration Act.

15. Having made this determination we turn to the alternative arguments advanced by the union. The union argues that the Board should find that the parties agreed to voluntary arbitration in accord with the provisions of Section 34c. (1) of the Labour Relations Act. Section 34c. (1) provides:

“Notwithstanding any other provision of this Act, the parties may at any time following the giving of notice of desire to bargain under section 13 or 45, irrevocably agree in writing to refer all matters remaining in dispute between them to an arbitrator of a board of arbitration for final and binding determination.”

The Board cannot adopt the union’s position vis-a-vis Section 34c. (1). The evidence clearly establishes that the parties did not agree to refer all matters in dispute to arbitration pursuant to section 34c. (1) of The Labour Relations Act. The parties having been advised by the conciliation officer, were of the view that they were covered by the provisions of the Hospital Labour Disputes Arbitration Act and the steps taken to place the issues between them before an arbitration board were carried out in accord with and under the belief that they were covered by the provisions of the Hospital Labour Disputes Arbitration Act. Indeed, Mr. Paul Middleton, the union representative, in his letter of September 22nd to Mr. Cline, counsel to the company, stated in part:

“ ... we would hereby refer the matters in dispute in our contract negotia-

tions to arbitration under the terms and procedures of the Ontario Hospital Labour Disputes Arbitration Act.”

The parties did not proceed under Section 34c. of The Labour Relations Act and we so find.

16. A “collective agreement” is defined in The Labour Relations Act as:

“1.(1)(e) ‘collective agreement’ means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees, and includes a provincial agreement;”

The Board has long held that implicit in the requirement that the agreement be in writing is the necessity for signatures. (See re *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221 and the cases cited therein.) It is clear on the evidence that at no time did the parties sign a document or documents which could be construed as a collective agreement. The evidence does establish that as of June 16, 1978 the parties, under the belief that they were bound by the arbitration award, reached an understanding as to the exact terms which would be included in a collective agreement between them. At no time, however, did the parties ever satisfy the statutory requirement for a signed agreement and accordingly, we must find that at no time did the parties enter into a collective agreement.

17. The union asks the Board to find that the parties had agreed on all of the terms necessary to effect a collective agreement and to characterize the failure of the company to sign the agreement as a violation of Section 14 of the Act. The union asks the Board to direct the company to sign the agreement as it did in re *Casimir and Jennings* (supra). The distinctions between this case and the *Casimir and Jennings* case are of major significance. In the *Casimir and Jennings* case the Board was satisfied that the parties, through their collective bargaining endeavours, were *ad idem* on all issues between them. The Board in fashioning its remedy in that case stated:

“The major distinguishing factor between that case and the one before us, lies in the fact that no ‘interest arbitration’ is here involved. There is no need in this case for the Board to fashion solutions for issues which are separating the parties as there are no such issues: there is no need for the Board to substitute its value judgments on particular issues for those which might be hammered out between the parties as they have all been hammered out. In addition, *the imposition of a collective agreement in such circumstances in the terms which have already been agreed to by the parties, is not a supplanting of the voluntary bargaining process but rather a re-affirmation of it.*” (Emphasis added)

In this case the parties were unable to “hammer-out” agreements on a number of key issues and under the mistaken belief that they were not permitted to resort to economic sanctions submitted their dispute to an arbitrator pursuant to the Hospital Labour Disputes Arbitration Act. The arbitrator was required to deal with overtime, work schedules, sick leave,

health and welfare, allowances, vacations, term and wages. The company was prepared to incorporate the terms of the arbitration award into a collective agreement until advised that it was not covered by the Hospital Labour Disputes Arbitration Act and further, that it would not be provided with funding to cover the cost of implementing the award. The Board is satisfied that up until July 6, 1978 the company was of the belief that it was covered by the Hospital Labour Disputes Arbitration Act. There is no evidence to support the conclusion that the company ever attempted to mislead the union or that it proceeded to arbitration under the Hospital Labour Disputes Arbitration Act in the knowledge that it could later repudiate the result if unacceptable. In these circumstances we are not prepared to find that the company's refusal to sign an agreement based in large part on the terms awarded at arbitration, and not on the basis of terms negotiated by the parties, constitutes a breach of section 14 of the Act. The advice given to the company on July 6th and the notice that funds would not be forthcoming must be characterized as an intervening event as would allow the company to reassess its position. The Board finds that there has been no violation of section 14 of the Act.

18. Having regard to all of the foregoing, the Board hereby advises the Minister that there is no collective agreement between the parties and that consequently, he has no authority to appoint an arbitrator or arbitration board member.

19. The Board has reviewed the evidence and further finds that the company has not violated section 56, 58 or 61 as has been alleged by the union. Accordingly, the section 79 complaint is hereby dismissed.

20. The parties to this unusual and unfortunate case must now attempt to return to the bargaining table and carry on their negotiations under the procedures laid down in The Labour Relations Act. In view of the fact that the conciliation between the parties was carried out under the mistaken belief that the parties were bound by the procedures of the Hospital Labour Disputes Arbitration Act and in view of the fact that the issues between the parties have now been assessed by an impartial Board (albeit one which acted without jurisdiction), the parties would be well advised to request the appointment of a mediator before asking the Minister to advise as to whether or not he intends to appoint a Board of Conciliation.

1107-78-R Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v **Hancock Sand & Gravel Limited**, (Respondent).

Certification – Bargaining Unit – Charges – Membership Evidence – Allegation of improper organizing tactics – Rank & File employee advising others of higher admission fee if membership acquired apart from certification process – No threat to job security – Bona fide discussion of fee structure

– Allegation of intimidation rejected.

BEFORE: Donald D. Carter, Chairman, and Board Members J.D. Bell and R.F. Rutherford.

APPEARANCES: Douglas J. Wray and Max McDavid for the applicant; W.J. McNaughton, J. Andreoli and W. O’Riordan for the respondent.

DECISION OF THE BOARD: October 24, 1978.

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.
3. The applicant proposed a single bargaining unit which would include both the truck drivers working out of the respondent’s quarry in Brock Township and those persons employed as production and maintenance workers in the quarry. The respondent submitted that the Board should find two bargaining units appropriate for collective bargaining – one a bargaining unit of truck drivers and the other a bargaining unit of production and maintenance employees.
4. The applicant agreed to the Board resolving this issue on the basis of particulars supplied by the respondent. These particulars disclose that, while the two groups of employees are employed at the same location, there appears to be a functional division between them. The truckers are employed to deliver aggregates from the quarry and are not involved in the transport of the product within the quarry, while the production and maintenance employees are employed solely within the quarry. The two groups work out of separate locations within the quarry, and are subject to separate supervision. There appears to be a minimal amount of interchange between these two groups of employees. Working conditions for the two groups differ. Their hours of work are different, and each group enjoys different wages and benefits. The work of the production and maintenance workers, moreover, is generally year-round, while for the truckers it is much more seasonal in nature. The Board, having regard to these facts and in its earlier decision in *Armbro Materials and Construction Ltd.*, [1973] OLRB Rep. Aug. 450, considers that two bargaining units would be appropriate in the circumstances of this case.
5. The Board finds that all truck drivers employed by the respondent at or out of its aggregate operation in Brock Township, save and except foremen, dispatchers, and persons above the rank of foreman and dispatcher, office, sales, and technical staff, constitute a unit of employees of the respondent appropriate for collective bargaining. This bargaining unit will be referred to as bargaining unit # 1.
6. The Board finds that all production and maintenance employees of the respondent at its aggregate operation in Brock Township, save and except foremen, persons above the rank of foreman, office, sales, and technical staff, students employed during the school vacation period, and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining. This bargaining unit will be referred to as bargaining unit # 2.

7 The respondent submitted that a cloud had been placed upon the membership evidence submitted by the applicant because of misleading statements made during the organizing campaign. According to the respondent, certain employees, when attempting to persuade their fellow employees to sign the applicant's membership applications, had brought improper pressure to bear. Counsel for the respondent argued that, because this type of pressure had been applied to four of the 46 persons falling within the two bargaining units, the reliability of all of the applicant's membership evidence was in doubt, requiring the Board to dismiss the application, or at least to order a representation vote. In support of this approach counsel cited *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288.

8. The applicant argued that these charges did not justify an inquiry by the Board, since no membership evidence had been submitted in respect of the four persons to which it was alleged that these statements had been made. The charges, therefore, were not relevant, and the Board should proceed to certify the applicant on the basis of the membership evidence submitted. The Board ruled that it would proceed to investigate the allegations made by the respondent. As the Board pointed out in *Alex Henry, supra*, it is concerned that, where a trade union seeks to be certified on the basis of membership alone, such membership evidence be free of "any cloud or taint". The Board then heard the evidence relating to the manner in which the four employees were asked to join the union.

9. Bob Cook, a Hancock employee for just over five years, testified that, on September 16th, he was approached by a fellow employee, Ross Kittle, who informed him that, if he paid \$1.00 now, then he would only have to pay \$15.00 to join the applicant, but that if he waited it would be \$100.00. Cook stated that there was no discussion about being required to join the union in the future, and that he did not make any assumptions about what might happen in the future. In his words, he signed the union card because "the \$100.00 looked good in my pocket". Toward the latter part of September he was approached by Kittle again and asked to re-sign, but this time Cook refused. No further approaches were made to Cook concerning union membership. Kittle's account of these two meetings was not significantly different from Cook's. Kittle testified that he told Cook that it would cost \$15.00 to join the applicant but anyone coming in who was not then an employee would have to pay \$100.00. According to Kittle, he approached Cook to re-sign the card because the first card had not been properly completed.

10. Dennis Dunster, another five-year Hancock employee, testified that he was approached by Kittle some time in the middle of September. When he asked whether he would join the union, he indicated that he didn't know and then inquired about the cost of joining. Kittle indicated that it would be \$1.00 to join and then \$15.00 if he joined immediately, and \$100.00 if he joined later. Dunster also testified that Kittle told him that another truck driver was receiving 15 cents per hour more than he was, a statement which..he later discovered was inaccurate. At that point he signed the union card and paid the \$1.00. At a later time, however, he was again approached by Kittle who asked him to re-sign because the first card had been filled out improperly. Apparently, because Dunster had been expressing regrets about signing a union card, Kittle approached in a manner that indicated he was not optimistic about the possibility of Dunster re-signing. According to Kittle, when he first approached Dunster, he told him that membership would cost \$15.00 for anyone joining now and \$100.00 for newcomers, and at the second meeting he made it clear that it was \$15.00 for any employees at work at that time and \$100.00 for newcomers. Kittle further testified that he told Dunster that another employee, who was not a truck driver at that time, was earning the additional 15 cents per hour.

11. Bruce Leask, a sixteen-year employee, testified that he was approached by Ken Anderson about joining the union. When asked about the cost, Anderson replied that it could be \$1.00, \$14.00, \$18.00 or even \$100.00, Leask remained noncommittal, and the conversation ended.

12. William Attridge, who had been employed by Hancock since May 1978, testified that Roger McClure approached him about joining the union. According to Attridge, McClure told him that the union was in, and that he could sign now for \$15.00 and later for \$100.00. Attridge bluntly refused to join the union and the conversation ended.

13. What effect do these statements have on the membership evidence submitted by the applicant? There is no evidence that these statements were other than isolated incidents occurring during the applicant's organizing drive. It is significant, moreover, that these statements were made by rank-and-file employees, and not by a full-time union official. What we are dealing with here are honest attempts by ordinary employees to explain the applicant's fee structure. The conversations did not contain any express threat to job security, nor is it reasonable to read into these statements any implied threat to job security. If the statements made gave rise to any misunderstandings, the employees involved had full opportunity to seek clarification which they chose not to do.

14. This situation here is unlike that found in *Alex Henry & Son Ltd.*, *supra*, where a full-time union official at a meeting of employees did not disclose fully the union's fee structure, leaving the clear implication that employees who did not join immediately would have no alternative but to pay the higher fee later if they wished to keep their jobs. In these circumstances the Board held that the union official had the responsibility to clarify any statements that might be construed by employees as being a threat to their job security.

15. The Board considers that it would be unrealistic to expect the same standard from the rank-and-file organizer as from the full-time union official. It is reasonable to assume that the ordinary employee is less conversant with the operation of union security provisions. If less than a full explanation is provided by him, moreover, its impact upon other employees is likely to be less than where the statements of a full-time union official suffer from the same defect. As the Board indicated in *Crenmar Services Limited*, [1978] OLRB Rep. Jan. 48, the rank-and-file organizer is not likely to be perceived by his fellow employee as being in a position to seek to achieve the consequences of any statements he may make during a union organizing campaign. Where employees discuss the merits of joining a union among themselves, it does not seem unreasonable to expect that a few misconceptions might arise, some lending support to the union and some working the other way. We consider that employees are quite capable of dealing with such misconceptions by seeking any necessary clarification, and then making an informed decision as to whether they wish to join a union.

16. The facts in this case support these observations. All four of the employees to whom the statements concerning the applicant's fee structure were made did not become union members. While Cook and Dunster initially signed a union card, they quite adamantly refused to re-sign when approached the second time. Leask and Attridge refused from the outset to join the applicant even when informed of the fee structure. Their responses and actions do not in any way indicate that they were improperly influenced. No cloud, therefore, has been cast upon the applicant's membership evidence, and the Board is not

prepared to exercise its discretion under section 7(2) of the Act and order the taking of a representation vote.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made were members of the applicant on October 5, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant in respect of bargaining unit #1.

19. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on October 5, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant in respect of bargaining unit #2.

0450-78-M London Generator Service, (Employer), v International Union, United Automobile Aerospace Agricultural Implement Workers of America and its Local 27, (Trade Union).

Reference – Timeliness – Conciliation – Held that agreement with automatic continuation clause ousts right to give notice to bargain under section 45 – Distinction between “renewal” and “continuation”

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members F. W. Murray and D. B. Archer.

APPEARANCES: *W. R. Buchner, Wm. J. Buchner, Elmer A. Williams and Peter Whitfield for the employer; B. Chercover, Al Seymour and Herb Iuplupson for the trade union.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER F. W. MURRAY: October 18, 1978.

1 The Minister has referred to the Board, pursuant to section 96 of The Labour Relations Act, the question as to whether the Minister has authority under the Act to appoint a conciliation officer.

2. The trade union was certified as bargaining agent for certain employees of the respondent approximately 15 years ago. Since that time they have concluded some ten collective agreements, the last of which became effective on March 31, 1977.

3. The 1977 agreement, as had its predecessors, contained the following section:

The Agreement shall remain in full force and effect until the 31st day of March, 1978, and shall continue in effect from year to year thereafter, on an annual basis excepting that either party desiring to change, modify, amend or terminate the Agreement on the anniversary date hereof, shall submit a written request to the other party, of his desire in the matter, within sixty (60) days and at least thirty (30) days before the anniversary date of the Agreement, setting forth the changes desired.

4. By letter dated March 3, 1978, the trade union wrote the following letter to the company:

Dear Sir:

This is to advise that the Union wishes to commence negotiations to propose amendments to the present Agreement, in accordance with the Labour Relations Act of Ontario and the Collective Agreement between the parties.

Awaiting your reply.

Yours truly,

Al Seymour, International

Representative, U.A.W.

5. The company, through Mr. Peter Whitfield, President, in a letter dated March 21st, replied as follows:

Dear Sir:

Your letter sent by registered mail and dated the 3rd of March, 1978 has been received.

We would draw to your attention section 17 of the present agreement which requires that any desire to change the agreement would require notice within 60 days of the end of the contract and at least 30 days before such end. You will appreciate therefor that your notice is not proper and the corporation is relying on section 17 and considers that the present agreement is in force for one more year. The corporation is however increasing wages by 6% on the first day of April next.

Yours truly,

Peter Whitfield

President.

6. The position of the company is that the Minister does not have the power to appoint a conciliation officer under section 15 of the Act since the union has failed to comply with the notice of desire to bargain requirements of section 17 of the collective agreement, with the result that the collective agreement has not "ceased to operate" within the meaning of section 45 of the Act, but continues to operate as provided for by the same section 17, at least until the next anniversary date. The relevant portions of section 45 are the following:

45.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.

7. It is beyond dispute that the notice of desire to bargain sent by the union dated March 3, 1978 was not delivered within the time stipulated in the collective agreement.

8. In support of its position the company relies upon the decision of the Board in *Hield Brothers Ltd. (Kingston)*, 57 CLLC ¶18,071 and subsequent cases in which the Board has followed that decision.

9. In the *Hield Brothers* case (supra), the collective agreement provided that the agreement would continue in effect from one year from date and "thereafter during annual periods of one year each, unless either party notifies the other in writing not less than sixty days and not more than ninety days prior to the annual expiration date that a revision or discontinuance is desired".

10. In that decision the Board held that the notice to bargain had not been given in accordance with the duration clause of the collective agreement. It went on to say that that being the case, the union, if it were to succeed, had to bring itself within the provisions of section 38(1) (now section 45) of the Act. The Board then held that since the collective agreement provided for its continuation where notice was not given in accordance with the terms of the duration clause, the agreement continued in effect and did not "cease to operate" with the result that the notice could not be given pursuant to section 45.

11. The company, in the present case, took the position that the duration clause in its collective agreement with the union is similar in intent to that in the collective agreement in the *Hield* case. It points out that there is no mention of the term "renew" or "renewable" in the agreement and that there is no term of like import in the duration clause. It argues that since the procedure outlined in section 17 of the collective agreement was not followed, the agreement did not "cease to operate" and, consequently, the notice requirements of section 45(1) of the Act do not apply.

12. In further support of its position the respondent cited the following list of cases in which the Board has followed the *Hield* (supra) decision:

Walfoods Limited, 1958 CCH Canadian Labour Law Reporter, 16,113; *White Motor Co. of Canada Ltd.*, [1959] OLRB Rep. April 47; *Kingston Builders' Exchange*, [1959] OLRB Rep. May 82; *Dundas Construction Co. Ltd.*, [1962] OLRB Rep. Nov. 319; *Kimberly-Clark Pulp and Paper Co. Ltd.*, [1963] OLRB Rep. Jan. 449; *Lakehead Hotelkeepers Assoc.*, [1965] OLRB Rep. May 116; *Kraft Food Ltd. of Berwick, Ontario*, [1966] OLRB Rep. Dec. 729.

13. The union submitted that, notwithstanding the fact that the Board had followed the *Hield* (supra) decision since 1957, that decision was dead wrong and ought not to be followed. The union contended that the dissenting opinion in *Hield* incorporated the proper view on the issue and that it ought to be adopted by this Board and that the majority decision in that case should be reversed. The union submitted that the *Hield* principle has not been followed recently and that the Board has eaten into the concept and has reverted to the position said to have been taken by it prior to the *Hield* decision and referred to in the dissent thereto.

14. In view of the reliance placed upon it by counsel for the union, it seems appropriate to review the dissenting opinion in the *Hield* case.

15. The dissent sets out the question before the Board as being whether a union can ignore the termination clause of its agreement and still give proper notice under section 38(1) [now 45(1)] of the Act. It is said in the dissent that up to that time the Board had held that a union could do that. However, there is no reference to specific cases given in the dissent.

16. The dissent goes on to say that the interpretation given to subsection 2 of section 38 by the majority is contrary to the clear meaning of the words of that subsection and states:

The simple meaning of this subsection is that, if a collective agreement contains provisions for the giving of notice which are different from those contained in section 38(1) and notice is given in accordance with such provisions in the collective agreement, then the notice is valid even though the time and manner in which it was given are different from those provided in section 38(1). In no way which is justified can this subsection be read to mean that if notice is given in accordance with section 38(1) and not in accordance with the provisions of the collective agreement, then such notice is invalid. To give it this meaning is to stretch, and indeed distort, the language of section 38(2).

17. The foregoing does not deal directly with the presence in the duration clause of the proviso that the agreement is to "continue" in the absence of notice. The use of the word "continue", however, was a cardinal point in the majority decision.

18. The latter decision makes the point that the earlier decisions which touched on the problem raised in the *Hield* case were clearly distinguishable. It then referred to the *Motor Products* case, (1944) D.L.S. 5-1103, 7-530 and the *Canadian Bridge* case (1945) 7-1161 where the question was whether a notice requesting amendment of a collective agree-

ment constituted a notice to renew for the purposes of the Act in the circumstances of these cases. The conclusions drawn in those cases are summarized in the *Hield* case as indicating that, under the Regulations then in force, renewal meant renewal with or without amendments. It was indicated further that the foregoing cases established that, in negotiations for renewal of a collective agreement, the terms of the agreement are subject to change when renewal with amendment is requested "in the same way as when notice of termination has been given".

19. The Board then goes on to mention two further cases, namely, the *Pollard Manufacturing Co. Ltd.* case, (1948) D.L.S. 7-1379; 48 CLLC ¶ 16,516 and the *Aluminum Goods Ltd.* case, (1948) D.L.S. 7-1377; 46 CLLC ¶16,438.

20. The *Aluminum Goods Ltd.* case concerned an application for certification in which the question arose as to whether a collective agreement constituted a bar to the application. The duration clause in the collective agreement reads:

This agreement shall remain in force until 1st April, 1945 and from year to year thereafter unless notice of amendment or termination is given by either party not less than but not more than sixty clear days before its expiry date.

The Board in the *Aluminum* case found that notice had been given within the time stipulated in the agreement and the agreement was found to be no longer in effect and so did not constitute a bar. The application for certification was dismissed but on entirely different grounds.

21. In the *Pollard* case (supra) was an application for the appointment of a conciliation officer which was opposed on the grounds that the collective agreement was operative or had "automatically renewed itself". The duration clause in question provides as follows:

This agreement shall become effective as of 4th day of November, 1946, and shall remain in effect until November 4th, 1947, and hereafter shall be automatically renewed from year to year, unless in any year at not more than sixty days and not less than thirty days prior to the November 4th, 1947, either party shall furnish the other with notice, by registered mail of the termination of, or proposed revision, or addition to, any provision thereof. In such event, any negotiations on such proposals, revisions or additions shall take place within thirty days of such notice. All provisions not so terminated, or proposed to be revised, or added to, shall continue in force and effect.

22. It was held in the *Pollard* case that notice was given on September 29, 1947 and this served to bring about the termination of the agreement.

23. The Board, in the *Hield* case, distinguishes the *Aluminum Goods* case and the *Pollard* case from the one before it in the following manner:

... the duration article in each of the agreements stipulated that the agreement was to continue in effect for one year and that it would auto-

matically *renew* itself from year to year thereafter unless terminated on notice given between fixed dates preceding the anniversary date in each case. The term “renew” suggests not a continuance of the existing agreement but a resuscitation or regeneration or revivification. The old agreement comes to an end, ceases to operate in the language of Section 38, and a new one comes into existence at the fixed point of time. In the instant case, the situation is quite otherwise; the original agreement does not come to an end unless and until notice has been given in accordance with the terms of the agreement.

24. The reference by the Board in *Hield* to the duration clause in each agreement as providing that the agreement would “renew” itself is not precise, as the word does not appear in the *Aluminum Goods* case. It would thus seem that the word “renew” and the phrase “remain in force” were viewed as having the same effect in bringing an agreement to an end. A similar conclusion appears to have been reached in *Cem-Al Spray Limited*, [1974] OLRB Rep. Oct. 688. However that may be, it is clear that the Board in *Hield* was taking pains to point out that the cases up to that point had not dealt with a duration clause in which the word “continue” had been used. It would thus appear that the reference by the dissenting members in *Hield* to the decisions “up to now” and the suggestion by the union in the present case that the Board return to its earlier decisions require that the Board eliminate the distinction made between the effect of the word “renew” and the word “continue” and accord them the same effect in causing the collective agreement to “cease to operate”, and thus allow notice under section 45 of the Act, notwithstanding the language of the collective agreement.

25. In support of its submission that the Board must modify its position in dealing with notice under section 45, and look at earlier decisions in the process, the union made reference to *Peel Memorial Hospital*, [1977] OLRB Rep. July 452. In that case the Board reviews the *Backstay Standard Co.* case, 46 CLLC ¶16,462. The case was decided under the Wartime Labour Relations Regulations. The relevant section reads:

Either party to a collective agreement may on ten clear days’ notice require the other party to enter into negotiations for the renewal of the agreement.

In that case it was found that less than ten clear days’ notice was given but that it was nevertheless effective “to secure the bargaining position of the union” which, apparently, was in danger. In any event, that case, as cited, does not deal with the duration clause, if any, in the collective agreement. In the *Peel Memorial* case itself (*supra*) it was found that by reason of a rollback by the AIB in the circumstances of that case that the collective agreement had expired. The Board then dealt with the question as to whether notice can be given under section 45 in those circumstances. The Board states:

Section 45 does not say that if either party wants to give notice to bargain it *shall* be within the ninety day period. The purpose of providing a limited period at the end of an agreement for the giving of notice to bargain is to provide stability between the parties for as much of the agreement as possible. At the same time, however, it is desirable to provide a sufficient time prior to the termination of the agreement to ena-

ble the parties to conclude, if possible and if desired, a successor agreement. Notice informs the other party and the public that negotiations will follow. Once notice is given certain rights, duties and obligations follow to enable the parties to carry out their negotiations.

The rollback and its effect on the collective agreement provides the Board with a unique example of why the time period set out in section 45 must be viewed as directory, not mandatory. If the parties were precluded from being able to give effective section 45 notice to bargain after their collective agreement has been terminated by circumstances far beyond their control, the purpose and scheme of the Act would be frustrated. A panoply of rights, duties and obligations under the Act is triggered by, and only by, the giving of effective section 45 notice to bargain. If section 45 notice cannot be given in these circumstances, then, the negotiation process as envisioned by the Act cannot be set into motion. Unless such notice is found to be effective under section 45 the parties will not be required to bargain in good faith; they will not be assured of an undisturbed atmosphere in which to commence their negotiations because they will become immediately subject to the possibility of displacement and termination applications; they will not be able to obtain the services of a conciliation officer and they will not be able to engage in a legal strike or lockout.

In view of the considerations set out above the Board finds that the time period set out in section 45 is directory not mandatory and that notice given after the termination of a collective agreement may be effective notice under section 45 of the Act.

26. The *Peel Memorial* case (supra), however, did not have to deal with the question of the effect to be given section 45 in the face of an agreement in the duration clause for continuance of operation in the absence of notice within a specified time, which is the case with the agreement before us.

27. The union also placed reliance upon the Board's decision in the *Dravo of Canada Limited* case, [1977] OLRB Rep. Sept. 568 and the *Norfolk Knitters Ltd.* case, [1973] OLRB Rep. Apr. 202.

28. In the *Dravo* case (supra) the collective agreement expired on August 31, 1973. Notice was not given until June 21, 1977. It is to be noted, however, that the agreement did not contain any provision for its renewal in the absence of notice in writing. The case is, therefore, clearly distinguishable from the *Hield* case. It deals with the right to give notice after the agreement has expired.

29. The *Norfolk Knitters Ltd.* case (supra) deals with the timeliness of an application for certification of an intervening trade union in which the respondent company sought to raise a continuing collective agreement as a bar.

30. The duration clause reads:

This agreement shall remain in effect until the 31st day of March, 1973 and shall continue automatically thereafter for annual periods of one year each unless either party notifies the other in writing prior to the expiration date that it desires to amend or terminate this agreement. Notice of desire to amend the agreement may only be given within a period of ninety (90) to sixty (60) calendar days prior to the expiration date of this agreement.

31. Neither party to the collective agreement served notice on the other within the prescribed period. The union did serve notice of desire to bargain by a letter dated February 9, 1973.

32. The application for certification was filed on February 2, 1973. The respondent's argument was that since no notice was served as prescribed, the collective agreement had renewed itself automatically *as of January 30, 1973* (emphasis added).

33. The Board rejected the argument of the respondent that the agreement had renewed itself as of January 30, 1973 and found that the agreement would "continue automatically" from March 31, 1973 and not from January 30, 1973, so that the application for certification was during the last two months of the term of the collective agreement.

34. The Board in the *Norfolk Knitting* case did not deal with the *Hield* view and was mainly concerned with the preservation of the open period which the respondent sought to set back to the time prior to January 30, 1973. The Board was concerned to point out that the renewal could not be back-dated so as to close out the agreement at an earlier date and bar an application for certification.

35. There can be no question that the preponderance of cases dealing with the effect of the wording in the duration clause over the years since the *Hield Brothers* case was decided in 1957 have followed that case and none has directly challenged it. Parties have come to rely upon the interpretation which has endured throughout these years. Weight must therefore be given to the words chosen by the parties for use in their collective agreement. There is something to be said for the argument that the *Hield* case embodies a distinction without, as the union appears to argue, any real difference, at least for practical purposes, between "renew" and "continue". There is, on the other hand, dictionary support for the finding that "renew" suggests not a continuance but a cessation and re-commencement and, therefore, an ending. On the other hand, it is difficult to conclude that to "continue" can be construed as involving or requiring a cessation of operations.

36. Finally, there must also be taken into consideration the fact that the duration clause of the type under discussion has been given validity and its effect defined in section 5(6) of The Labour Relations Act itself which provides as follows:

Where a collective agreement referred to in subsection 4 or 5 provides that it will continue to operate for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, a trade union may, subject to section 53, apply to the Board for certification as

bargaining agent of any of the employees in the bargaining unit defined in the agreement during the further term or successive terms only during the last two months of each year that it so continues to operate, or after the commencement of the last two months of its operation, as the case may be.

37. In the result, therefore, we find no grounds upon which to reverse the finding of the *Hield* case and the long list of decisions which follow it. The answer to the Minister is, accordingly, no.

DECISION OF BOARD MEMBER, D. B. ARCHER:

1. I dissent.

2. My reasons have been stated in the *Hield* case and in other cases. The majority decision seems to close the door to negotiations and conciliation, yet leave it open for an application for certification or termination. This double standard I cannot support. In my opinion there are two options open to unions, objectors, etc. – the time limits in a specific agreement and those in the Act. The time limits in the Act are for, among other things, to allow objectors to exercise their rights. I believe the union, for the same reasons, should be able, in giving notice, to rely on the provisions of the Act.

3. I would therefore have advised the Minister of his ability to appoint a conciliation officer as requested by the union.

0718-78-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant), v **The Ontario Hospital Association**, (Respondent), Group of Employees, (Objectors).

Certification – Charges – Allegation of irregularities in membership evidence – Application withdrawn – No bar imposed.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *H. Carl Anderson and Clare Meneghini for the applicant; F. G. Hamilton, R. R. Dunsmore and G. I. Campbell for the respondent; Joyce Meadows and Norma M. Cooper for the objectors.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER D. B. ARCHER; October 2, 1978

1. The name “Ontario Blue Cross – O.H.A.” appearing in the style of cause of this application as the name of the respondent is amended to read: “The Ontario Hospital Association”.

2. This is an application for certification in which a hearing was held before the Board on August 8, 1978.

3. In its Reply to the application, the respondent alleged improper conduct on the part of the applicant with respect to the membership evidence and the method in which it was obtained. It submitted that the application should accordingly be dismissed.

4. As the result of questions raised with respect to the lists, the composition of the bargaining unit and other matters of a like nature, the Board appointed an Examiner and a Labour Relations Officer and no evidence was introduced at the hearing with respect to the respondent's allegations.

5. On August 8, 1978 the applicant wrote to the Board stating that in the circumstances of certain matters which had just come to the attention of officials of the applicant, it was seeking leave to withdraw the application. No elaboration of the matters referred to in the letter was given.

6. A copy of the applicant's letter was forwarded to the respondent by the Board. In a letter dated August 24, 1978, the respondent opposed the request for withdrawal and requested that, having regard to the alleged irregularities, the application ought to be dismissed by the Board with a six-month bar before a new application might be made. The respondent asked for a hearing in order to present its position orally to the Board.

7. The respondent's letter was forwarded to the applicant and on September 8th the applicant replied to the respondent's letter in which it set out its position with respect to the issues raised by the respondent, and in which it disclosed that it had, on its own investigation, discovered irregular technicalities had occurred with respect to in-plant collection of fees. This letter was, in turn, forwarded to the respondent.

8. The Board has considered the written representations of the parties and has reviewed the jurisprudence and practice of the Board relevant to the issues raised. It has been the long-standing procedure of the Board in circumstances such as exist here to dismiss the application without the imposition of a bar. As the cases indicate, a dismissal does not preclude the employer or any other party of proper interest from raising relevant allegations of improprieties should any future application be made by the applicant and for invoking a dismissal if the allegations are established.

9. On the basis of the circumstances of the present case and having regard to the principles set out in *Hi Way Market Limited*, [1967] OLRB Rep. Dec. 835; *Fruehauf Trailer Company of Canada Limited*, [1973] OLRB Rep. Oct. 548; *Fruehauf Trailer Company of Canada Limited*, [1974] OLRB Rep. Jan. 6; *Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441; *Sherman Sand and Gravel Limited*, [1976] OLRB Rep. Oct. 610; and *Patchogue Plymouth Hawkesbury Mills*, [1972] OLRB Rep. July 747, the Board dismisses the application for certification, denies the request of the respondent and declines to exercise its discretion to impose a bar to a fresh application.

10. The decision of Board Member Murray will follow.

0738-78-U United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency, (Complainant), v United Brotherhood of Carpenters & Joiners of America, The Ontario Provincial Council of the United Brotherhood of Carpenters & Joiners of America, Local 785 of the United Brotherhood of Carpenters & Joiners of America, Steve Koehler and **Orlando Construction Co.,** (Respondents).

S-79 – Allegation of local bargaining dismissed in the absence of evidence of local union involvement in the supply of carpenters to respondent employer

BEFORE: R. A. Furness, Vice-Chairman, and Board Members M. J. Fenwick and E. C. Went.

DECISION OF THE BOARD; October 11, 1978

1. In a decision dated August 4, 1978, the Board dismissed this complaint that the respondents had acted contrary to the provisions of section 133(2) of The Labour Relations Act. More specifically, the Board dismissed this complaint against Orlando Construction Co. ("Orlando") because the complainant had failed to allege that Orlando had engaged in any conduct which was in violation of section 133(2) of the Act. In that decision the Board stated that it would give reasons for dismissing this complaint against the remaining respondents (that is to say, other than Orlando).

2. The evidence established that on or about July 4, 1978, the carpenters and carpenters' apprentices represented by the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America commenced a lawful strike in the industrial, commercial and institutional sector of the construction industry at a project known as the Conestoga Mall. The mall is being built as a joint enterprise between Cambridge Leaseholds Limited ("Cambridge") and Select Properties Limited. The general contractor on the project is Orlando. The scheduled date for the opening of the Conestoga Mall was August 16, 1978.

3. On July 14, 1978, Edward Stanyk, Cambridge's project co-ordinator at Conestoga Mall, sent a telegram to the various tenants in the mall. When the strike occurred these tenants were in the process of completing their premises in preparation for the opening. The telegram stated:

This is to inform you that August 16, 1978 is the firm opening date for Conestoga Mall. Please instruct your contractor or contractors to complete their work accordingly. Our understanding is that during the carpentry strike union labour is available from the local upon request. Ed. Stanyk Cambridge Leaseholds Ltd.

On August 1, 1978, Lorne Braithwaite, the president of Cambridge sent the following telegram to the tenants:

This will confirm that Ancillary Stores along with K-Mart, Robinson's and Dominion Stores, in Conestoga Mall, will definitely open 9:30 a.m.

Wednesday, August 16, 1978 (Stop) as of today – Monday, July 31, 1978 – the site is not picketed and under certain conditions, trades are available J. Lorne Braithwaite President Cambridge Leaseholds Limited.

4. Mr. Braithwaite gave evidence and stated that it was Cambridge's desire to encourage the tenants to complete their premises during the strike. He informed the Board that he based his information about the availability of labour and the absence of picketing on reports from Mr. Stanyk. Mr. Stanyk testified that he usually telephoned the project during the morning regarding the work of particular tenants. On occasions he visited the project and observed that carpenters were working for some of the tenants during the strike. Mr. Stanyk informed the Board that he based his message in the telegram that "Our understanding is that during the carpentry strike union labour is available from the local upon request" upon his visual inspection at the site. Mr. Stanyk testified that he did not speak to either Tony Bialek, who was employed as a supervisor by Orlando, or any representatives of the respondent trade unions about the fact that some carpenters were working on the project on various occasions after July 4, 1978.

5. The only evidence with respect to any involvement in this complaint by the United Brotherhood of Carpenters and Joiners of America, Local 785 ("Local 785") and Steve Koehler was given by Diane Baldwin, the bookkeeper for Madesin Store Fixtures ("Madesin"). Mrs. Baldwin testified that Madesin had carpenters working for it at the Conestoga Mall after July 4, 1978. She gave evidence that she prepared the payroll records and stated that dues were deducted and submitted to Local 785 with respect to the carpenters employed by Madesin. The witness identified four authorizations for check-off of strike assessment signed by four persons and witnessed by Mr. Koehler. These assessments are dated July 10, 1978. Mrs. Baldwin gave evidence that she heard that the new hourly rate for carpenters was \$10.40 as opposed to the former rate of \$9.40. However, as a result of a letter which Madesin received from the Grand Valley Construction Association (the "Association"), Mrs. Baldwin telephoned the Association and was informed that the correct hourly rate was \$9.40. The witness then telephoned Local 785 and spoke to a Mr. Ball who confirmed that the hourly rate was \$9.40. Mrs. Baldwin informed the Board that she did not discuss the authorizations with Mr. Ball and that nothing further was said between them. There was no evidence before the Board that Madesin remitted any check-off of strike assessment to Local 785.

6. The complainant has alleged in its complaint as follows:

On or about July 5, 1978, Orlando Construction Co. advised store owners at the Conestoga Mall Project that carpenters could be hired during the strike at a premium rate of pay, *by agreement with the said Local Union.*

Shortly thereafter several carpenters represented by the United Brotherhood of Carpenters and Joiners of America, Local 785 reappeared on the project and *several others were ordered back to work by the Union.*

(emphasis added).

7. There is no evidence before the Board that Local 785 agreed that carpenters could be hired during the strike at a premium rate of pay. There is no evidence before the Board that Local 785 ordered anyone back to work. There is no evidence before the Board that the respondents played any part in the availability of carpenters at the Conestoga Mall after July 4, 1978. While there is evidence that carpenters worked at the Conestoga Mall, there is nothing before the Board which indicates that such carpenters were there with approval of or by arrangement with any of the respondents.

8. The Board is not satisfied on the basis of the evidence before it that any arrangement affecting employees represented by an affiliated bargaining agent other than a provincial agreement has been made by any of the respondents within the meaning of section 133(2) of the Act. In our view there was insufficient evidence before the Board to justify the drawing of the wide inferences requested by the complainant.

9. For the foregoing reasons this complaint was dismissed at the hearing on August 4, 1978.

0139-78-R Labourers' International Union of North America, Local 506, (Applicant), – V – **P & R Concrete Finishing**, (Respondent), The General Contractors' Section of the Toronto Construction Association, (Intervener #1), Local 598 of the Operative Plasterers' and Cement Masons, International Association of the United States and Canada, (Intervener #2).

Certification – Prehearing Vote – Practice & Procedure – Construction Industry – Confirmation of Board practice that persons eligible to vote are those at work on the terminal date

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and H. Simon.

APPEARANCES: *S. B. D. Wahl and F. Amis for the applicant; no one appearing for the respondent; no one appearing for intervener #1; Giovanni Balanzin for intervener #2.*

DECISION OF THE BOARD; October 5, 1978

1. This is an application for reconsideration of the Board's decision herein dated July 31, 1978.

2. It arises in an application for certification by way of a pre-hearing vote in the construction industry. In its earlier decision the Board followed its established practice of counting only those ballots which are cast by employees who were at work for the employer in the voting constituency on the terminal date assigned by the Registrar. Counsel for the applicant submitted that that practice resulted in depriving some five persons of the opportunity to vote. While the persons in question did work for the respondent they were not at work on the terminal date. Counsel asked the Board to reappraise the practice of restricting

eligibility to vote in the construction sector to those employees who are at work on the terminal date. He argued that the Board's practice gives an employer the opportunity to gerrymander the work force on the terminal date so as to possibly affect the outcome of a representation vote.

3. The Board does not see in that argument any basis to depart from its normal practice in conducting representation votes in the course of applications for certification in the construction industry. The transiency of the work force in the construction sector is such that the Board has been required to establish rules related to fixed dates both for the purposes of assessing membership strength at the date of application and support among the employees in a representation vote taken at a later date. To the extent that an employer might seek to deliberately inflate or deflate its work force for the purpose of defeating a representation vote it would unlawfully interfere with the right of employees to select or reject a bargaining agent. The Board has in the past dealt with unfair labour practices of that kind and has remedied an employer's attempt to deliberately alter the composition of the voting constituency. (*Custom Aggregates* [1978] OLRB March 215). In the Board's experience there have not been widespread attempts by employers to frustrate the Board's voting process in the construction industry. As long as isolated attempts to do so can be remedied by the exercise of the Board's vigilance and discretion the need to depart from the Board's existing practices, practices which are well known and understood by both unions and employers, is obviated.

4. The request for reconsideration is therefore denied.

1876-77-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, Applicant, – V – **Harold R. Stark Limited** and Superior Plumbing and Heating Company Limited, Respondents.

Related Employer – Parallel businesses under common direction and becoming related – Board declining to make declaration because of 8 month delay in bringing application

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *L. C. Arnold and C. Burroughs for the applicant, G. Grossman and W. C. Stark for Harold R. Stark Limited and D. L. Brisbin and Wm. Skribe for Superior Plumbing and Heating Company Limited.*

DECISION OF THE BOARD; October 19, 1978.

1. This is an application under section 1(4) of The Labour Relations Act by which the applicant is seeking a declaration that the respondents be treated as one employer for purposes of the Act. The applicant further seeks a declaration that the respondent Superior Plumbing and Heating Company Limited (hereinafter referred to as Superior) be deemed

bound by the collective agreement between the applicant and the Mechanical Contractors Association, Zone 12 by which the respondent Harold R. Stark Limited (hereinafter referred to as Stark) is bound, and further that the employees of Superior are, from time to time, represented in collective bargaining by the applicant.

2. Section 1(4) of the Act provides in part as follows:

“Where, in the opinion of the Board, associated or related activities or business are carried on, by or through more than one corporation, ..., under common control or direction, the Board may, upon the application of any ... trade union ..., treat the corporations ... as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

Thus, in an application under this section, if the Board finds that two corporations are carrying on associated or related activities or businesses under common direction or control, it has discretionary authority to treat the two corporations as constituting one employer under the Act. In other words, the Board does not automatically grant section 1(4) relief to an applicant upon a finding that two or more corporations are under common control or direction and carrying on related businesses. The Board has used its discretion not to grant such relief where it considers that it would not be appropriate in the circumstances of the case to do so. When deciding the exercise of its discretion, the Board must have regard for the purpose of the section within the scheme of the Act. This purpose includes prevention of the undermining of a trade union's existing bargaining rights in respect of the employees of one employer by the business activities of the other related employer. A more detailed exposition of the purpose of the section may be seen in paragraphs 9 – 13 inclusive in *Industrial Mine Installations Limited* [1972] OLRB Rep. October 1029. When the Board is assessing whether this purpose would be appropriately served by declaring two corporations to be one employer under the Act it takes certain factors into account. Factors pertinent to this case are:

- (a) whether the applicant has acted promptly to seek section 1(4) relief after it first became aware (or ought to have become aware) that the two respondents are closely associated in their businesses;
- (b) whether there are employees whose rights under the Act to choose their own bargaining agent would be interfered with; and
- (c) whether the applicant is trying to circumvent, by means of section 1(4), the normal process of certification.

3. In the instant case, the Board has reviewed carefully extensive and detailed evidence on the direction, control and alleged associated or related activities of Stark and Superior. Therefore, having done so, if the Board were to make a finding of fact (which it is not) that the two respondents are carrying on associated or related activities or businesses under common direction or control, it next would need to satisfy itself whether a declaration that the respondents are as one employer under the Act would be an appropriate exercise of its discretion in all the circumstance of the case. On the evidence before the Board, it would determine that this application is not one in which it would be appropriate to exercise

the Board's discretionary power. Thus the Board would decline to treat the respondents as constituting one employer for the purpose of the Act. Its reasons therefor are set out below, together with the facts on which they are based as established by the evidence of Mr. W. C. Stark on behalf of Stark, Messrs. B. Tanguay and W. Skribe on behalf of Superior and Mr. C. F. Burroughs on behalf of the applicant.

4. Stark was founded in 1927, incorporated in 1955 and does business as a plumbing and heating, sheet metal and electrical contractor in the industrial, commercial and institutional sector of the construction industry. It is the plumbing and heating element of its business with which this matter is concerned. Stark has approximately twenty employees in this part of its business and its field work force is unionized. It is the only plumbing and heating contractor in Oshawa whose employees are represented by the applicant, although it is common practice for contractors from Metropolitan Toronto, when performing work in Oshawa, to do so by hiring members of the applicant. Stark generally seeks jobs in excess of \$50,000 value, mostly performs jobs over \$100,000 value and in recent years has performed eight jobs in excess of \$1 million. According to the applicant, Stark has done the biggest jobs in the territory in question in this case.

5. Superior started in business and was incorporated in 1971. It is a plumbing and heating and sheet metal contractor. This matter is concerned only with the plumbing and heating element of its business. It was formed to carry out residential and industrial service and repair work, residential construction and minor industrial, commercial and institutional construction. Superior represents five different manufacturers of fire protection, heating and environmental control equipment and installs and services their equipment. The majority of its jobs are of one to three days duration and, until 1975, did not usually exceed \$30,000 in value. During the past five years revenue had come equally from service and maintenance work and construction. Its work force in plumbing and heating numbers 15 employees and is not unionized. The same employees do both service and maintenance work and construction. When they are doing service and maintenance work, they perform it from vans specially equipped for this work and on which Superior's name is prominently displayed. Superior is one of the four largest non-union plumbing and heating contractors in Oshawa.

6. Superior (in respect of its construction business) and Stark have followed separate but parallel paths, with Stark performing primarily in the unionized segment of the I.C.I. sector of construction, while Superior has performed in the non-union segment of that sector and in residential construction which is predominately non-union. Stark has the skill and equipment capability to do the more complex industrial construction work undertaken by Superior, subject to being competitive on price. Superior, on the other hand, does not have the skill and equipment resources to undertake most of the jobs which Stark performs.

7. Stark employees have not performed Superior's jobs or vice versa, with the single exception of a job in November, 1977, at Oshawa General Hospital on which Stark sub-contracted some work from Superior. There has been no transfer of employees between the field forces of the two firms.

8. In 1975 Superior performed an industrial plumbing job valued at \$60,000 and in mid-1976 took on an apartment building job valued at \$30,000. Starting early in 1977 and continuing during the balance of the year, Superior obtained jobs ranging in value from \$30,000 to \$144,000. Most were obtained by private bid and the rest by public tender. All

were obtained from non-union general contractors. There were seven jobs in all with an average value of \$68,000. Five of the seven jobs were started in the first half of the year. These activities represent a clear departure to its business practices prior to 1975.

9. At the date of this application Stark was bound to a collective agreement between the applicant and the Mechanical Contractors' Association. It has been a party to or bound by collective agreements with the applicant, or its predecessor, since 1955. The current agreement is characterized by the parties to this matter as applying to the I.C.I. sector, although its language does not so limit it. Its geographic scope is roughly that of Board areas No. 9, 10 and 11. The applicant trade union was formed by the consolidation of three former locals (Oshawa, Peterborough and Port Hope/Cobourg) of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

10. Mr. Burroughs, who for six years has been business manager of the applicant and its predecessor Oshawa local, has known Stark for more than 15 years and has known Superior since it was formed. From the time Superior started in business, he has been aware of its trucks and employees coming and going in the territory for which he is responsible. It is clear from Mr. Burrough's evidence that he was aware at least by June or July of 1977 of the change in the value of the jobs being obtained by Superior and that these jobs included what he considered to be "union" types of jobs. If the applicant was not aware that part of Superior's business, from the start, was in the industrial, commercial and institutional sector (the applicant's primary area of interest), the evidence indicates to the Board that it ought to have been.

11. The applicant has not made any organized effort to acquire bargaining rights for the Superior employees. It has not grieved to Stark about the activities of Superior or sought either via Stark or directly with Superior to have Superior covered by the applicant's collective agreement with the Association. It has not approached Superior employees to get them to join the applicant, other than asking one employee if he or other Superior employees would be interested in joining the trade union.

12. The facts before the Board indicate a change in Superior's construction activities to include execution of construction jobs of substantially greater value than previously obtained. The change surfaced first in 1975 and emerged clearly in 1977. It is this change which triggered the application. It is this change which the applicant considers capable of undermining its bargaining rights for Stark employees because jobs of this value are ones which Stark has been able to get in the past and gets fewer of now.

13. Had the parallel construction operations of the respondents continued without change since the formation of Superior, the Board's jurisprudence shows that it would not be disposed toward granting a 1(4) declaration. A clear change in Superior's business is evident, however, by the first half of 1977 and, were the Board to deem that change to be an undermining of the applicant's existing bargaining rights, it would be from that point of change that the Board would consider whether the applicant responded promptly to the change. This application was filed in March 1978, approximately a year after the change would have been evident to a diligent observer and some eight months after the applicant became aware of Superior undertaking larger jobs. Now it is seeking by means of section 1(4) to gain bargaining rights in respect of Superior employees who have been unrepresentative.

sented during all of the time when they have worked for that respondent. It is these factors, together with all of the circumstances of this case, that have caused the Board to conclude that it would be inappropriate for the Board to exercise its discretion and treat the two respondents as one employer for the purposes of the Act.

14. The application is therefore dismissed.

0805-78-U; 1045-78-U C.U.P.E. and its Local # 1320, (Complainant), v
Scarborough Centenary Hospital Association, (Respondent).

S-79 – Alleged violation of statutory freeze – Change in work organization and hours of work, and use of non bargaining unit employees held to be a breach of the freeze restrictions

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members O. Hodges and W. H. Wightman.

APPEARANCES: *Beth Symes and Ray Tilley for the complainant; M. G. Levis, J. Simone and E. Laycock for the respondent.*

DECISION OF THE BOARD; October 24, 1978

1. At the hearing the parties joined in a request that the above two files be consolidated and the Board orders such consolidation.

2. We are dealing with complaints filed under section 79 of The Labour Relations Act alleging contraventions in both instances of section 70(1) of the Act by the respondent in its dealings with the named grievors, and additionally, in respect to Board File No. 1045-78-U, alleging contraventions of sections 56, 59, 61 and 14 of the Act.

3. There existed a collective bargaining agreement between the parties which expired March 31, 1978. Notice to bargain had been served on February 9, 1978; there was a Conciliation Meeting on July 21, 1978 and the "No Board" report was issued August 3, 1978. The parties, in their collective bargaining relationship, are governed by *The Hospital Labour Disputes Arbitration Act* and a date of October 23, 1978 has been set for the commencement of the interest arbitration proceedings. There is no dispute that the "freeze period" of section 70(1) of *The Labour Relations Act* came into effect as of the date of notice, February 9, 1978, and by virtue of section 10 of *The Hospital Labour Disputes Arbitration Act* continues in effect at the time of this hearing and therefore was in effect at the times the events which are the subject of these complaints took place.

4. In respect to Board File No. 0805-78-U, Mrs. Carmine DeFreitas, one of the grievors, was employed by the respondent September 3, 1971 and assumed the position of a Cashier in the staff cafeteria sometime in 1973 according to her recollection, (the respondent states it was in May, 1974 according to the records) and so continued till July 17, 1978 at which time the respondent reduced the cashier complement from two full-time employees

to one full-time employee and one part-time employee; Mrs. DeFreitas' status was thus changed at that time to one of a part-time cashier. It is to be noted that part-time employees do not fall in the bargaining unit.

5. Mrs. DeFreitas testified that she had been on vacation July 3rd to 10th, when she received a call from her supervisor advising that the change in cashier staffing was being made immediately and would be effective July 10, 1978 and that Mrs. DeFreitas was unable then to go in and see Levis and went to work as usual at 10:30 a.m. Monday, July 10th, 1978. DeFreitas did see Levis on July 10th and he confirmed that the change in manning was being made and because of her seniority position, DeFreitas would be part-time. DeFreitas objected that she was not in a position to work part-time, but nonetheless, effective from July 17, 1978 she commenced as a part-time cashier.

6. Mr. M. G. Levis, Personnel Manager, testified that prior to Mrs. DeFreitas becoming a full-time cashier in 1974, the cafeteria was operated with one full-time and one part-time cashier but that the increasing usage of the cafeteria arising from increasing staff and usage by nursing students then numbering some 230 required converting the part-time job to a full-time job and it was as a result of this that DeFreitas became a full-time cashier. At that time the cafeteria was open from 6:05 a.m. to 7:00 p.m. and the two cashiers operated on staggered shifts: in 1976 breakfast serving was discontinued and nursing students in residence were discontinued and the cafeteria hours were changed to 9:00 a.m. to 7:00 p.m. with the two full-time cashiers continuing on staggered shifts. The respondent states that decreased usage of the cafeteria was the basis for making the change in manning.

7. Levis states that, apart from DeFreitas, during 1978, there has been a reduction in cafeteria staffing by the permanent lay-off of one dietitian (not in the bargaining unit) and the non-replacement of 7 persons in the bargaining unit who retired, resigned or transferred. Levis also states that, coincident with the change in cashier manning, DeFreitas was offered and refused a transfer to a full-time position of Dietary Aide to replace a resigning employee. Following DeFreitas' refusal, no replacement was made of the resigned Dietary Aide.

8. Since July, 1978 there have been two posted vacancies for which DeFreitas applied and was not the successful applicant and these are now the subject of grievance.

9. Raymond Tilley, President of the Union, testified that he just learned in writing from the respondent, of the change in cashier staffing by letter of July 12, 1978, although he had had a brief discussion with the respondent previously. Tilley states that the union felt that no change such as this should be made during the freeze period and that further that it was improper that the respondent had dealt directly with DeFreitas on the matter prior to approaching the union. Tilley testifies that the union never consented to the change and Levis confirms that the respondent made no approach to the union to obtain their consent.

10. The applicant argues that changes in manning are not covered by the collective agreement and that consequently the employment status of DeFreitas must be considered an employee privilege affected by the section 70 freeze and relies on the principles in *The Hydro Electric Commission of Mississauga* [1977] OLRB Rep. Dec. 821 and in a case involving the same two parties as now before us found in Board File No. 0447-78-U. The applicant also argues that such a transfer, in effect, unilaterally altered the bargaining unit and

infringed on the union's representation rights. The respondent argues that the collective agreement contains no guarantee of a fixed staffing which is the logical extension of the applicant's argument; and that DeFreitas' refusal of a transfer to a full-time job in the same department was the reason for her present non-employment in the bargaining unit and that she was not "laid-off" by the respondent. The respondent argues section 1.01(d) of the collective agreement gives the employer the right to determine manning and refers us to the case of *Molson's Brewery (Ontario) Limited* [1977] OLRB Rep. Aug. 526.

11. In order for the applicant to succeed it must demonstrate that the respondent has altered a "term or condition of employment or any right, privilege duty" contrary to section 70(1) which envisages a maintenance of the status quo of these items during the total bargaining period. At the time of the freeze DeFreitas was employed as a cashier and her employment relationship was governed by the collective agreement: if she has a right to be continued as a cashier, irrespective of circumstances during the freeze period, it must be because such a right existed prior to the freeze and was extended in existence by the freeze. Entitlement to a specific job assignment by an employee would require express and specific language in the contract which is not here present, nor was any evidence led from which it can be inferred that this was a privilege extending to employees apart from the contract.

12. The purpose of section 70(1) is to maintain the existing status quo of the total employment relationship as it affects the trade union, the employer and the employees. Part of the total employment relationship in this case was set out in Article 1.01(d) of the collective agreement which provides:

"The Union recognizes ... that it is the exclusive function of the Hospital ... (d) to determine the kind and locations of machines and equipment to be used, the allocation and numbers of employees required from time to time."

It is clear from this, that prior to the freeze, the employer had the right to determine the number of employees required as cashiers, and this right is expressly acknowledged in the agreement and continues to subsist during the freeze period. It is not a case of a "broadly worked Management Rights Clause" being invoked of an express and specific right of the employer spelled out in the contract between the parties. In our view the instant case, in this respect, clearly falls within the principles enunciated in *Molson's Brewery (Ontario) Limited* [1977] OLRB Rep. Aug. 529.

13. We see no merit to the argument that the respondent's action was in some fashion interfering with the union's right to represent all employees in the bargaining unit, as defined. It is true that Mrs. DeFreitas is now employed as a part-time cashier and such job falls, by agreement of the parties, outside the bargaining unit. There is no evidence to suggest that the respondent has been engaging on a course of deliberately utilizing persons outside the unit to erode the bargaining rights of the union. There is a clause in the collective agreement, Article 19.02, which reads:

"Employees whose jobs are not in the bargaining unit shall not work on any job which is included in the bargaining unit, except for ...".

However, this clause, in our view, does not relate to the employment of part-time employ-

ees, which practice was recognized at the time the collective agreement came into effect and indeed it was during the predecessor agreement that it was established that part-time employees had been used in respect to this very position of cashier.

14. Under all the circumstances of this case we find that there has been no contravention of section 70(1) and the complaint in respect to Mrs. DeFreitas is dismissed.

15. In respect to Board File No. 1045-78-U, the applicant alleges that the respondent has contravened section 70(1) of the Act by its activities of not filling a position of Medical Staff Secretary which is included in the bargaining unit and by creating a position of Administrative Secretary outside the bargaining unit.

16. The position of Medical Staff Secretary has been in the bargaining unit throughout the period of the collective bargaining relationship. The position involves attendance at Medical Committee Meetings and the recording of minutes, provision of secretarial assistance to the Medical Staff Society, which is a local social and/or recreational organization, and to provide vacation relief in the general offices. Around August 24th the then incumbent, a Mrs. Drysdale, was informed by Mr. E. Laycock, Assistant Administrator of Medical Services, that the Administration did not view the duties of Medical Staff Secretary as being full-time and that he, himself, would assume the administrative liaison role in the Medical Committee and that the Medical Staff (private physicians practicing at the hospital) would take care of their own secretarial needs. Drysdale was also informed that a position of Administrative Secretary was being created which would report to Laycock in his position as Assistant Administrator of Medical Services, and that this new position was being offered to her. Drysdale asked for time to consider the matter and returned to Laycock four or five days later advising him that she had obtained employment elsewhere.

17. The new position of Administrative Secretary came about as a result of a management re-organization consequent upon the retirement of a Mr. Varty who had been Associate Administrator and the re-distribution of functions previously supervised by him. Laycock's position of Assistant Administrator of Medical Services was created in May or June, 1978 and he then assumed responsibility of those areas previously covered by Varty (except for Personnel and Psychiatry) and moved into the office previously occupied by Varty. Varty's Secretary had left in June 1977 and not been replaced and Laycock prior to his present appointment did not have a secretary.

18. From the evidence presented before us we find that the duties previously encompassed by the bargaining unit job of Medical Staff Secretary have been in part eliminated, i.e., secretarial service to Medical Staff, and in part transferred outside the bargaining unit, i.e., attendance at, recording of minutes of and the administrative liaison role in relation to the medical committee which have been assumed by Laycock. We heard nothing as to how vacation relief in the general office, which was also an element in the Medical Secretary's job will be re-assigned presumably because that facet has not yet occurred. The appointment of a secretary to Laycock would appear to be not relevant in the elimination of work normally performed by persons represented by the applicant as bargaining agent through the transfer of such work to be performed by persons falling outside the bargaining unit.

19. Article 19.02 of the collective agreement, contra to its irrelevance in a case such as DeFreitas', was intended to preclude the type of situation which exists in respect to the

position of Medical Staff Secretary. By this Article the respondent made an undertaking that “employees whose jobs are not in the bargaining unit shall not work in any job which is included in the bargaining unit ...”. That was a duty owed by the respondent at the time of the freeze and which must continue unless otherwise consented to by the union. The respondent’s evidence establishes that a non-bargaining unit employee is performing work on a job included in the bargaining unit and this is a contravention of section 70(1) of the Act.

20. The applicant in seeking remedial relief has sought a direction from the Board that the respondent post a vacancy for Medical Staff Secretary or declare the position of Administrative Secretary as within the purview of the collective agreement. In the Board’s view it is inappropriate for the Board to determine whether the position of Medical Staff Secretary should be filled: that is a right of the respondent employer under the contract and which continues to subsist under section 70(1) of the Act. In respect to the inclusion of the Administrative Secretary that is not a matter to be raised under section 70(1) but to be dealt with by the parties in another forum.

21. The Board orders the respondent to forthwith cease and desist from requiring or permitting persons whose jobs are not in the bargaining unit to perform work previously performed by the Medical Staff Secretary which job is in the bargaining unit.

22. The Board is not satisfied that this same set of circumstances constitute a contravention of sections 56, 59 or 61 of the Act and, in any event, the remedial order in connection with our finding relative to a section 70(1) contravention is curative of the situation. In respect to the allegation of a contravention of section 14 of the Act, the Board would be unprepared to make a Board finding of this type based on a single, narrow incident which has occurred during the course of negotiating a new collective agreement and which negotiations undoubtedly have involved a myriad of other facets of which we have heard nothing, and which would be of great probative value in evaluating whether the parties are bargaining in good faith and making every reasonable effort to make a collective agreement.

0280-78-R Association of Commercial and Technical Employees, Local 1704 – Canadian Labour Congress, (Applicant), – V – **Temgo Inc.**, (Respondent), Group of Employees, (Objectors).

Certification – Whether union constitution contains membership restrictions which prevent its certification

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *Douglas J. Wray, Ralph Ortlieb, R. W. Drew, Karen Palmer and Veronica Bernadette Eden for the applicant; R. C. Fillion, H. Freedman, T. Gorski and S. Stein for the respondent; no one for the objectors.*

DECISION OF THE BOARD; October 4, 1978

1. The name: "McDonald Restaurant – Midland, Ontario" appearing in the style of cause of this application as the name of the respondent is amended to read: "Temgo Inc.'.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The applicant has applied for certification with respect to certain employees of the respondent who work in one of its restaurants in Midland. The respondent has raised as an issue between the parties, the status of the applicant to represent the employees in the proposed bargaining unit. The respondent alleged that the applicant had been chartered to represent office, clerical and technical employees in Toronto and not other employees at other locations.
4. The constitution of the Canadian Labour Congress and the by-laws governing chartered local unions were referred to by the parties and are set forth:

CONSTITUTION

Article III, sections 1 and 2

The Congress shall be composed of (1) affiliated national and international unions, regional and provincial organizations, or units thereof, (2) chartered local unions and (3) chartered provincial federations of labour and local labour councils.

The Executive Council shall have power to issue charters or certificates of affiliation to organizations desiring to be chartered by or affiliated with this Congress. This power may be delegated to the President. Subject to the provisions of this Article, charters or certificates of affiliation shall not be issued to national and international unions, regional and provincial organizations, organizing committees; or directly chartered local unions in conflict with the jurisdiction of affiliated national and international unions or regional and provincial organizations, except with the written consent of such unions, and shall be based upon a strict recognition that both craft and industrial unions are equal and necessary as methods of trade union organization, and that each affiliated national union, international union and regional or provincial organization is entitled to have its autonomy, integrity and jurisdiction protected and preserved. If in the opinion of the Executive Council the foregoing procedure is invoked to the detriment of the best interests of the Congress, the Executive Council by a two-thirds vote shall have the authority to grant such charter or certificate of affiliation.

Article XVI, section 1

Subject to Article III, Section 2, and other applicable provisions (sic) of this Constitution, the Congress may issue charters to local unions and organizing committees.

BY-LAWS

Article II

The objects of the local union shall be to regulate the conditions of employment between its members and employers with whom it has a collective bargaining relationship, to support and carry out the purposes and policies of the Canadian Labour Congress, and to engage in such other activities as, in the opinion of its members, are conducive to their social, economic and political well-being.

Article VII – sections 1 and 2

The jurisdiction of a local union with respect to scope of membership and territory shall be determined by the Executive Council of the Canadian Labour Congress, and may be altered by the Executive Council when, in its opinion, such action is warranted. If necessary, a new charter shall be issued to the local union concerned.

The Executive Council may, at its discretion, amend any charter previously issued, delete therefrom, add thereto, or substitute names of charter members as it sees fit. Such amended charter shall replace the charter previously issued without, in any other way, affecting the status of the local union.

5. It was agreed that at a meeting on May 8, 1973, certain persons had agreed to apply to the Canadian Labour Congress for Charter 1704, Association of Commercial and Technical Employees, C.L.C. The application for a charter was made on behalf of “the employees working in banks, brokerage houses, insurance company’s (sic), trust company’s (sic) and auxiliary company’s (sic) to the above mentioned industries”. The applicants agreed to comply with all requirements of the constitution of the Canadian Labour Congress. At this same meeting it was also agreed that the regular monthly meetings of Local 1704 be held every second Wednesday of each month at 5:30 p.m. in the A.C.T.E. office at 185 Bloor Street East, Toronto. On May 9, 1973, the Canadian Labour Congress granted an interim charter to certain names persons and “their associates and successors, constituting a local union of the Canadian Labour Congress, to be known as LOCAL 1704 ASSOCIATION OF COMMERCIAL AND TECHNICAL EMPLOYEES situated at Toronto in the Province of Ontario for the purpose of promoting the welfare of its members.”. In a letter dated May 29, 1973, the Director of Organization of the Canadian Labour Congress notified the secretary-treasurer of Local 1704 that the application for charter had been received and approved and that Charter Number 1704 had been issued in the name of A.C.T.E. Local 1704. No question arises concerning the status of the applicant as a trade union under section 1(1)(n) of The Labour Relations Act.

6. Ralph Ortlieb, the regional director of organization for the Canadian Labour Congress, gave evidence concerning the organizational practices of the applicant. He testified that the applicant organized beyond the limits of Metropolitan Toronto and from his personal knowledge referred to an organizational campaign in Hamilton at M & T Chemicals with respect to a group of production employees. The witness referred to an organizational campaign in Sudbury with respect to employees of a branch of the Bank of Montreal. Mr. Ortlieb also referred to an organizational campaign in Stratford with respect to office,

clerical and technical employees of Kroehler Mfg. Co. Limited. The witness also referred to various organizational campaigns and applications for certification before the Board with respect to office, clerical and technical employees in Metropolitan Toronto. He informed the Board that despite the applicant's organizational drives it has neither a certificate of the Board nor a collective agreement with respect to employees who are not within the category of office, clerical and technical employees.

7. In cross-examination Mr. Ortlieb agreed that the Hotel and Restaurant Workers Union was affiliated with the Canadian Labour Congress and that this trade union and several other trade unions organize employees who work in restaurants. The witness agreed that the officers of the applicant work in Metropolitan Toronto and that the applicant's meetings have always been held in the city of Toronto.

8. One question before the Board is whether there are any eligibility requirements in the applicant's charter, constitution or by-laws within the meaning of section 92(4) of The Labour Relations Act which would preclude the employees who are affected by this application from being admitted to membership. The other question before the Board is whether there are any restrictions on the applicant's endeavours to organize employees who work in restaurants.

9. There is no dispute that the applicant has been chartered pursuant to Article XVI, section 1, of the constitution of the Canadian Labour Congress. Article III, section 2, of that constitution, it is argued, is not complied with if the applicant organizes and accepts the respondent's employees into membership. The provisions of Article III, section 2, refer to the internal policies of the Canadian Labour Congress and in any event there is no evidence that this section has not been satisfied. While certain persons have applied for a charter on behalf of "the employees working in banks, brokerage houses, insurance company's (sic), trust company's (sic) and auxiliary company's (sic) to the above mentioned industries", the Canadian Labour Congress has not imposed any limitations in the granting of the charter. In addition, there is no evidence that the jurisdiction of the applicant has in any way been restricted, altered or amended by the Canadian Labour Congress. Article III of the by-laws sets forth the requirements for applicants for membership. This article does not contain any eligibility requirements which the employees who are affected by this application have been unable to meet. Article III refers only to the payment of stipulated amounts of money as an initiation fee and prohibits discrimination with respect to membership by reason of race, creed, sex, colour, religious belief, nationality or national origin. On the basis of the representations before it, the Board finds that the applicant does not have any eligibility requirements of a restrictive nature as contemplated by section 92(4) of The Labour Relations Act. The Board finds that the evidence of membership filed by the applicant is evidence of membership as contemplated by section 1(1)(j).

10. The assignment or recognition of jurisdictions of affiliates or chartered locals is a matter within the power of the Canadian Labour Congress and the Board finds no reason to interfere in such internal affairs of the Canadian Labour Congress.

11. Mr. C. Robicheau, Labour Relations Officer, is authorized to inquire into and report to the Board on the list and composition of the bargaining unit.

0977-78-M The Utility Contractors Association of Ontario, (Employer), – V – Labourers' International Union of North America, Local 527, (Trade Union), – V – The Ontario Provincial District Council of the Labourers' International Union of North America, (Intervener).

Reference – Construction Industry – Conciliation – Right of member of uncertified council of unions to break away and bargain independently

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members H. J. F. Ade and M. J. Fenwick.

APPEARANCES: *W. J. McNaughton, L. Terry, W. Lippett, L. Mullin and D. Flynn for the employer; F. Manoni for the trade union; Michael J. Reilly for the intervener.*

DECISION OF THE BOARD; October 24, 1978

1. The name "Utility Contractors Association" appearing in the style of cause of this application as the name of the employer is amended to read: "The Utility Contractors Association of Ontario".

2. This is a reference by the Minister under section 96 of The Labour Relations Act in which the question is raised as to whether the Minister has the authority to appoint a conciliation officer.

3. Labourers' International Union of North America, Local 527 (hereinafter called "Local 527") is one of the unions named in a collective agreement, dated June 30, 1976, between The Utility Contractors Association of Ontario and The Ontario Provincial District Council of The Labourers' International Union of North America representing (in the words of the collective agreement) the following affiliated local unions: Labourers' International Union of North, Local 183, 247, 491, 493, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089. The agreement expired on May 1, 1978.

4. It was not disputed that Local 527 was bound by the terms of the above collective agreement.

5. The solicitors for Local 527 sent the following letter under date of July 26, 1978 to the Contractors Association:

Please be advised that we act for the Labourers' International Union of North America, Local 527 and that as of July 26; 1978, it no longer wishes to be represented by the Ontario Provincial District Council of the Labourers' International Union of North America in any negotiations with the Utility Contractor's Association and, or its members. This action and notice is taken pursuant to Section 43(5) of the Ontario Labour Relations Act and Local 527 will not be bound by any collective agreement negotiated or signed by the above-mentioned Council. All future negotiations will be carried on directly with Local 527.

If you have any inquiries please do not hesitate to call.

6. Section 43(5) of the Act referred to in the above letter reads as follows:

Where a council of trade unions, other than a certified council of trade unions, commences to bargain with an employer or an employers' organization, it shall deliver to the employer or employers' organization a list of the names of the trade unions on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members or affiliates of the council of trade unions for whose employees the respective trade unions are entitled to bargain and to make a collective agreement at that time with the employer or the employer's organization, except a trade union that, either by itself or through the council of trade unions, has notified the employer or employer's organization in writing before the agreement is entered into that it will not be bound by a collective agreement between the council of trade unions and the employer or employers' organization.

7. The council of trade unions in the present case is not a certified council of trade unions and, therefore, falls within the provisions of section 43(5) of the Act. The council of trade unions and the Association are presently engaged in collective bargaining so that the notice of July 26, 1978 was timely. Local 527 has applied to the Minister for the appointment of a conciliation officer. The Association opposes the application.

8. It was argued by the Association that Local 527 has no bargaining rights outside the council and that the request for conciliation should accordingly be denied.

9. It is the finding of the Board that Local 527 has been recognized by the Association as a union having bargaining rights and that it has been represented by the council as a member union having bargaining rights. The inclusion of Local 527 in the collective agreement referred to above and by which it was found by this Board to have been bound, confirms the above finding of the Board.

10. The Board finds that Local 527 has the right to bargain with the Association with a view to reaching a collective agreement between itself and the Association.

11. The answer to the question put by the Minister accordingly is "yes".

0573-78-R; 0574-78-R; 0575-78-R; 0576-78-R. International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant), – V – **Ventar Ltd., Vendrasco Ltd., T. Barbesin & Sons Ltd., Jack Moceri Co. Ltd.** (Respondents) – V – Operative Plasterers' and Cement Masons' International Association, Local 345, (Intervener).

Certification – Timeliness – Conciliation – Appointment of conciliation officer held to take

place on date parties are notified by Minister.

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and P. J. O'Keeffe.

APPEARANCES: S.B.D. Wahl and A. Colafranceschi for the applicant; no one appearing for the respondents and James Fyshe, Toni Mariano and Jean Guy Denis for the intervener.

DECISION OF THE BOARD; October 19, 1978

1. These are four applications for certification falling under section 108 of The Labour Relations Act. Each application was made on June 23rd, 1978. The intervener opposed each on the basis that, since a Conciliation Officer had been appointed on June 21, 1978, in connection with collective bargaining being conducted between the intervener and the respondents, the application were untimely by operation of section 53 of the Act. The Board ruled in its decision issued July 14, 1978, that a Conciliation Officer had been appointed on June 28th, 1978 making the application timely and directed that pre-hearing representation votes be held.

2. Following the votes, the intervener filed statements of desire to make representations in respect of the timeliness of these applications. A hearing was held to deal with these representations. The Board, at the hearing, directed consolidation of the four applications. The applicant then raised a preliminary objection to the hearing on the grounds that the Board would be allowing the intervener to reargue its case. The intervener held that the material facts on which the intervener's statement of desire relied had been put forward in its intervention, the Board had considered those facts and dealt with them in its decision directing the vote. Furthermore, since the intervention contained the submission that the application "ought to be dismissed without a vote or a hearing", the applicant argued that the intervener had agreed that the application could be disposed of without a hearing and therefore had waived its right to a hearing.

3. The Board, after hearing the representations of both parties on this preliminary objection, ruled that it would hear the matter. The Board does not consider the intervener's statement that the application "ought to be dismissed without a vote or hearing" to be either a waiver of any right to a hearing or an agreement that the Board dispose of the application without a hearing.

4. After disposing of this preliminary objection, the Board asked the parties to address the question of whether the date of appointment of the Conciliation Officer could be a date other than the date of the standard letter of notice from the Deputy Minister of Labour to the parties informing them of the appointment of the officer by the Minister. The text of the letter of notice is set out below.

"This is to advise that the Minister of Labour had appointed Mr. S. Billington as Conciliation Officer to confer with the parties and to endeavour to effect a collective agreement between them. Please note that Mr. S. Billington will convene a meeting of the parties on Thursday, July 13, 1978 at 10:30 a.m., in a meeting room, Holiday Inn, 350 Dalhousie Street, Oshawa, Ontario."

5. The intervener's argument is that section 15(1) makes it mandatory for the Minister to appoint a conciliation officer once a request is made and that the appointment is actually accomplished by the Ministry's internal procedures on a date prior to the date of the Deputy Minister's letter informing the parties of the officer's appointment. The intervener argues that it is that earlier date which is the actual date on which the officer is appointed, not the notification date. Stated specifically in the circumstances of this case, the intervener argued that;

- (a) The Request for Appointment of a Conciliation Officer was filed June 15, 1978 by the intervener's bargaining agent. By registered mail of the same date, copies were served on the respondents' bargaining agents.
- (b) Upon receipt of the request, the Ministry waited the five calendar days from the date of service on the respondents for objections to the granting of the application and having received none, stamped the following words on the request.

"This matter is referred to the Conciliation Branch for the assignment of an officer."

The same stamp imprints below the wording a signature line and under it the words "Deputy Minister of Labour". An employee of the Ministry has signed the statement for the Deputy Minister of Labour. The date June 21, 1978 has been stamped above the wording.

- (c) The administrative process outlined in item (b) fulfills the Minister's responsibility to appoint an officer and the stamping of the request is the first visible record of the appointment. While the specific officer has not been identified, the wording implies that approval has been given to appointment of a conciliation officer in the matter. All that remains to be done is the administrative task of assigning a particular officer to fill the appointment.
- (d) The letter dated June 28, 1978, from the Deputy Minister notifying the parties of the name of the officer appointed by the Minister and the memorandum of the same date to the officer advising him of his assignment to the dispute, serve only to complete the step of naming the officer to fill the appointment made on June 20, 1978.

The intervener supported its argument that the officer's appointment in this case was June 21st by pointing out that the officer attempted to contact the intervener's bargaining agent on June 21st; that the officer made contact on June 22nd and again on June 26th for the purpose of setting meeting dates and that he had also contacted the respondents' bargaining agent on June 23rd.

6. Accordingly, the intervener argued that the date which the Board should deem to be the date of appointment of the Conciliation Officer for purposes of section 53, is the date when the Request for Appointment of a Conciliation Officer is referred from the Minister's office to the Conciliation Branch for assignment of an officer. The intervener cites three reasons why this earlier date should be used by the Board.

- (a) Time is of the essence in the collective bargaining process. The Act recognizes this fact in section 17 by requiring the officer to report the results of his attempts at settlement to the Minister within fourteen days from his appointment. It makes sense then that the appointment of the officer becomes effective at the earliest possible date.
- (b) The party requesting the appointment would be protected from being prejudiced by delays from circumstances over which it has no control, keeping in mind that, apart from the officer's settlement function, the appointment also serves to protect the incumbent bargaining rights from being challenged.
- (c) The Act does not require that notice be given to the parties therefore the date of that notice holds no particular significance in determining when a conciliation officer has been appointed.

7. Counsel for the applicant argued in favour of maximizing the time limits during which an application for certification can be made under section 5 of the Act (which by reference to section 53 invokes the further time limits of that section). He argued that the already narrow time limits of section 5 inhibit the effectiveness of a person's right under the Act "to join a trade union of his choice and to participate in its lawful activities". The use of the date of the notice to the parties of the officer's appointment as the date for determining when an officer has been appointed is consistent with the aforementioned objective.

8. The sections of the Act bearing on the issue before this Board are sections 15(1) and 53(2) which read in part as follows:

Section 15(1)

Where notice has been given under section ... 45, the Minister, upon the request of either party, shall appoint a conciliation officer

Section 17(1)

Where a conciliation officer is appointed, he shall confer with the parties and endeavour to effect a collective agreement and he shall, within fourteen days from his appointment, report the result of his endeavour to the Minister.

Section 53(2)

Where notice has been given under section 45 and the Minister has appointed a conciliation officer ..., no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement ... shall be made after the date ... when the Minister appointed a conciliation officer ...

The language of both sections makes it patently clear that the Minister has the duty to appoint a conciliation officer upon the request of either party. Therefore, even though the Act does not speak to the manner in which an appointment should be made, it is obvious that

there is no appointment until the Minister, or someone authorized to act on the Minister's behalf, has actually made such appointment. The difficulty arises, however, in determining the actual point of time at which this appointment is made.

9. Should the Board go behind the standard letter of notice and examine the Ministry's internal procedures to determine when the Request for Appointment of a Conciliation Officer form was referred by the Minister to the Conciliation Branch? We think not. The problem with such an approach is that the date of appointment would not be readily ascertainable by the parties to the negotiations since they would not be privy to the Ministry's process. The Board considers it important that, especially in light of the time limit imposed by section 17 of the Act, that the parties know quickly and with certainty the point at which the conciliation process commences. This objective is best achieved by using the date of the official notice as the date of appointment rather than by examining the Ministry's internal procedures in each case.

10. For the above reasons, the Board is not satisfied that it should consider the date of appointment of a conciliation officer to be a date other than the date of the standard letter of notice to the parties that the Minister has appointed an officer. The Board thus confirms its decision that the application for certification was timely and upholds the pre-hearing representation vote taken accordingly to the Board's direction in its decision issued July 14, 1978.

11. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

12. The Board further finds that all plasterers and plasterers' apprentices in the employ of the respondent in the counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. For purposes of clarity, the Board notes the agreement of the parties that drywall tapers are included in the bargaining unit.

14. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

15. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots were cast in favour of the applicant.

16. Certificates will issue to the applicant.

17. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

DECISION OF BOARD MEMBER W. H. WIGHTMAN:

I find myself fully in sympathy with the arguments advanced by the Intervener in paragraph 6 of the Decision because I believe those arguments to be most consistent with the objective of stable union-management relations. Reluctantly, however, I must join with the majority in its conclusion that to go behind the standard letter of notice would create more problems than it would solve.

0765-78-R United Steelworkers of America, (Applicant), – V – **W. C. Pursley Limited**, (Respondent), – V – Group of Employees, (Objectors).

Certification – Petition – On the basis of evidence adduced, Board found petition voluntary

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members O. Hodges and R. Redford.

APPEARANCES: *Lorne Ingle and Mrs. Mary Shane for the applicant; C. M. McKeown for the respondent; Michael Horan and Tom Ogden for the objectors.*

DECISION OF ARTHUR L. HALADNER, VICE-CHAIRMAN AND BOARD MEMBER R. REDFORD:

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
- 3.. The Board finds that all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The Board finds that there were 87 employees in the bargaining unit at the time the application was made. The applicant's evidence of membership indicates that 50 of these employees had joined the union. In the normal course, such membership evidence would entitle the applicant to outright certification pursuant to section 7(2) of the Act. However, there was filed in this case a statement of desire in opposition to the union which, if found to be timely, and a voluntary expression of the true wishes of the employees, would cause the Board to order that a representation vote be taken under section 7(2) of the Act. The Board may, in its discretion, order that a representation vote be taken even though it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the applicant within the meaning of section 1(1)(j) of the Act.
5. The petition in this case was prepared, and circulated in the main by Tom Ogden and Bronko Guzina. Both Ogden and Guzina are members of an association committee which was formed two years ago to deal with employee problems and bargain with management. Ogden was elected chairman of that committee on July 21, 1978 – at a meeting at

which the committee formulated its demands. Later that day, the committee, with Ogden as chairman, met with the employer in the office of its president, George Whelan. At that meeting, the committee presented a list of problems together with a proposal. The meeting was adjourned after Whelan promised to get back to the committee with an answer not later than July 26th.

6. On July 26th, the employer received notice of the union's application for certification which was posted at approximately 11:00 a.m. At 3:00 p.m., the committee members, Tom Ogden, Bronko Guzina, Ed Sihoto and Ron Haas, were called to Whelan's office where they were informed that the applicant had applied for certification and that all negotiations with the association and the employees were suspended until after the matter was settled. The meeting was then closed.

7. Gunther Eicherman, the respondent's plant manager, gave evidence that after the meeting, Ogden, who had remained behind on his own motion, attempted to hand Whelan a paper which he said contained a list of employees opposed to the union. Whelan responded that he could have nothing to do with the list and that he did not want to know anything about it. Eicherman testified that Whelan did not accept the list and that he did not read it.

8. Later that day, Whelan, after consulting with his counsel, Mr. McKeown, instructed Eicherman to get hold of Ogden and tell him he could not do anything like that on company time and premises and that he should get rid of the list. Eicherman then telephoned Ogden, who had gone home for the day, and passed on the information Whelan had given him. Eicherman testified that he did not give Ogden any direction as to where or when he could circulate a petition (if at all). He said only that Ogden could not do it on company time and premises and that the company could not support it. When Ogden returned the next day and inquired whether the committee or management could do anything, he was informed by Eicherman that the company could do nothing. Eicherman testified that when Ogden continued to look to him for direction, he gave him two lists – one of things management could do, and one of things it could not. These lists, which had come to Eicherman during a previous period of employment, were Eicherman's way of making it clear to Ogden that the company could not help him. The lists, which were produced by Ogden at the hearing, read as follows:

WHAT MANAGEMENT CAN DO

1. Advise the employees that the Ontario Labour Relations Board has ordered a vote, which will be by secret ballot, and in which the employees will be asked to elect as to whether or not they wish to be represented by the union. Employees may be advised that the fact that an individual employee may have signed a union card does not mean that he is committed to voting for the union.
2. If favourable comparisons can be made, compare the benefits which employees presently enjoy with those in other similar establishments in the area, both union and non-union. If favourable comparisons cannot be made, employees can at least be advised of the value of benefits which they presently enjoy. However, in nei-

ther case can these communications be accompanied by threats or promises of benefit should the vote go in favour of the company.

3. Inform employees, without exaggerating, of the disadvantages of belonging to a union, including loss of income because of strikes, the requirement of serving on a picket line during a strike, and the expense of union dues, fines and assessment.
4. Inform employees that you prefer to deal with them as individuals rather than have the union as an outsider settle employee grievances.
5. Tell employees that any member of management is always willing to discuss with them any subject of interest to them.
6. Tell employees that management opposes the principle of compulsory deduction of union dues, which requirement is insisted upon by most unions.
7. Reply to union attacks on management policies or practices. Tell employees about any untrue or misleading statements made through a union organizer, by hand bill or through any other medium of union propaganda. Management may always give employees the correct facts.
8. Tell employees that they do not have to speak to union organizers or attend union meetings unless they wish to, nor must they supply their names or addresses or any other personal information to anyone unless they wish to do so.
9. Tell employees that if they are restrained, coerced or threatened by anyone on behalf of the union, this activity is unlawful and should be reported to management.
10. Tell employees that seniority provisions in union contracts often tend to handicap ambitious or skilfull employees in advancing to higher positions according to their abilities.
11. Tell employees that no union can make management agree to anything it does not wish to or pay any more than it is willing or able to pay.
12. Tell employees about any experience you may have had with unions.
13. Tell employees anything you know about the union, its policies, its leaders and officers. However, if any uncomplimentary or derogatory remarks are made, make sure that they can be borne out by fact.

14. Follow established practices with reference to lay-offs, discipline, work assignments, overtime, etc. However, these practices must be carried out impartially and without reference to any employee's participation or non-participation in union activities.
15. Tell employees that it is not necessary to belong to a union to ensure job security.

WHAT MANAGEMENT CAN NOT DO

1. Promise employees a pay increase, promotion or any other benefit if they vote against the union or if the union is defeated.
2. Threaten loss of jobs, reduction of income, discontinuance of any privileges or benefits presently enjoyed or use any intimidating language which may be designed to influence an employee concerning his vote.
3. Discriminate against any employee in terms of discipline, lay-off, work assignments, overtime, etc. because of his union activities.
4. Threaten to close down the plant or to drastically reduce operations if a union is elected as a bargaining representative.
5. Spy on union meetings or let employees think that they are being watched to determine whether or not they are participating in union activities.
6. Engage in any partiality favouring non-union employees over those active on behalf of the union.
7. Make any work assignment for the purpose of causing the employee who has been active on behalf of the union to quit his job.
8. Ask employees how they intend to vote.
9. Ask employees at the time of hiring or thereafter whether they belong to a union or have signed a union application card.
10. Ask employees about the internal affairs of the union such as meetings, etc. Some employees may, of their own accord, advise management of such matters and it is not unfair labour practice to listen. However, management should avoid asking questions to obtain additional information.
11. Make a statement that you will not deal with the union.
12. Visit the homes of employees for the purpose of urging them to reject the union.

13. Grant employees wage increases or special concessions in order to help defeat the union.
14. Give financial support or other assistance to employees who are opposing the union.
15. Start a petition or circular against the union or encourage or take part in its circulation if it is started by employees.
16. Establish an employee committee as a competing and preferred candidate to the union.
17. Engage in any discourse whatsoever relating to the campaign, employer/employee relations or union matters during the 72 hour silent period immediately preceding the date of the vote.

9. Tom Ogden gave evidence both in-chief and in reply. In his initial testimony, Ogden denied handing Whelan a petition after the meeting on the 26th. He also denied receiving a phone call from Eicherman that evening. His evidence was that Eicherman walked up to him in the plant while he was getting ready to leave and told him he could not circulate a petition on company time and premises and that after he asked him what he could do, Eicherman then gave him the list of dos and don'ts. When Ogden was recalled as a witness in reply, he remembered remaining behind in Whelan's office after the meeting on the 26th but not handing Whelan a petition. He stated, however, that if he did, Whelan refused to look at it. Ogden also testified that he had been telephoned by Eicherman on the afternoon of the 26th and that Eicherman told him to throw away the petition, that he could not do it, and that it was against the law. Ogden's explanation for not telling the Board about this phone call during his earlier testimony was that he had been asked whether Whelan had called him on the evening of the 26th and not whether Eicherman had called him in the afternoon. When informed by the Board that he had denied receiving a phone call from either Whelan or Eicherman, Ogden repeated that he had not been asked about a call in the afternoon. It should be recorded here that the Board was not satisfied with Ogden's explanations on these matters. We are of the view that he was less than forthcoming with the Board.

10. Ogden testified, during his initial examination, that the first petition, which was thrown in the garbage after Eicherman spoke to him and later retrieved by Guzina, was taken around the plant during working hours. He stated, however, that to his knowledge, no member of management was present during the period of the petition's circulation. The only evidence which could be said to contradict that statement was the evidence of Ed Sihoto who testified that he observed one of the employees, he did not say who, signing a petition in front of the glass office of a foreman – Joe Macko.

11. The second petition, the petition which was filed as evidence of employee opposition, was drafted by Ogden on July 29th; it was drafted after consultation with Mr. Horan, counsel for the objectors in this matter. The signatures on that petition were obtained by Ogden and Guzina with assistance from Bruce McGonigle. The signatures were obtained in the company parking lot before and after work and during lunch hour. Ogden testified employees were asked whether they wanted a union or not and informed that if there were enough signatures, it would stop the union from "just walking in". He testified that all em-

ployees were given an opportunity to read the preamble before signing. That preamble read as follows:

We the undersigned, employees of W. C. Pursley Ltd. no longer wish to be represented by United Steelworkers of America.

Guzina testified that he told employees the petition was to protest the union.

12. Ramnarine Ramrattan, Wilfred Lalbeharry and Loren Sabadello all gave evidence that they signed the petition without knowing it was in opposition to the union, and in Ramrattan and Lalbeharry's case, after they had been told it was not. Ramrattan, a lead hand in the respondent's brake department, testified that he was approached in the plant by Tom Ogden on Monday, July 31st, prior to commencing work, and asked for his signature. Ramrattan testified that when he asked why, Ogden stated it was to give the company a chance to say something on the day of hearing. Ramrattan then stated he would see Ogden in a couple of minutes. This, so that he would have an opportunity to decide whether to sign or not. After changing his clothes, Ramrattan went outside to the parking lot where he met Ogden and McGonigle. Again Ogden asked for his signature, and again Ramrattan asked why. According to Ramrattan, Ogden replied that it was to give the company an opportunity to say something on the day of the hearing and that it was nothing against the union. Ramrattan testified that Ogden and McGonigle then stated that if he signed, the company would have lots of benefits on the day of the hearing. Ramrattan then signed the petition without bothering to read it. His evidence was that, although not in the habit of signing things without reading them, he trusted Bruce and took his word. In response to questions as to why he believed his signature would be necessary to allow the company to make an offer and as to why the company was not distributing the document, Ramrattan stated that he did not know anything about unions.

13. It should be noted that July 31st was not the first occasion on which Ramrattan had been approached and asked to sign a petition. Ramrattan testified that he was approached by Ogden on July 27th, and asked to sign petition number one. Ramrattan testified that he did not sign because Ogden told him it was in opposition to the union.

14. Lalbeharry, a lead hand in assembly, testified that he signed the petition after Ogden told him it had nothing to do with the union and that it was to give the company a chance to give an offer and some benefits. Lalbeharry, who was present in the parking lot at the time Ramrattan signed, gave evidence that he did not read the preamble and that he did not ask to see it.

15. Sabadello, a bench operator, gave evidence that he was approached before work on July 31st by Ogden and McGonigle and asked to sign a petition which they said was to get a vote. Sabadello stated that he was given no explanation as to why he was being asked to sign and that he did not appreciate that the petition was against the union. He conceded, however, that he knew McGonigle to be an opponent of the union and that he had read the preamble before signing. Sabadello testified that neither Ogden nor McGonigle said anything about the hearing or about the company having an offer to make there.

16. When called as a witness in reply, Tom Ogden was unable to recall the details of the conversations which preceded the obtaining of the three signatures in question. Bruce

McGonigle, however, was able to give evidence on these matters. McGonigle categorically denied telling Ramratten or Lalbeharry that the petition had nothing to do with the union. His evidence was that he told them they (he and Ogden) were collecting names against the union and that if they didn't get enough names to stop the union, they might force a vote. McGonigle testified that there was no attempt made to hide the preamble which was clearly visible and that neither Ramratten nor Lalbeharry asked to read it. McGonigle testified that he made it clear to Sabadello that the purpose of the petition was to stop the union.

17. Ed Sihota, the chief in plant organizer for the applicant and a member of the bargaining committee, gave evidence that he was called into Eicherman's office on July 21st – at some point prior to the 3:00 p.m. meeting – and asked why the employees wanted to bring in a union and whether he was involved. Sihota's evidence was that he denied knowledge of any union activity. Under cross-examination by counsel for the respondent, Sihota volunteered that Whelan had stated, during the course of the discussion, that if the union got in, they might close the plant. Eicherman testified that he called Sihota to his office on July 20th after he had been informed by Joe Macko that rumours of union activity were circulating, and that he had also met with Ogden and the other committee members in an effort to ascertain the source of any problems. Eicherman was quite candid in acknowledging that one of the purposes of these meetings was to determine whether a union was organizing. He stated, however, that a purpose was not to find out the positions of the committee members. Eicherman's evidence was that he asked Sihota whether he had heard about any problems or union activity. After Sihota replied that he was not involved, that he did not need a union, and that he could speak for himself, Eicherman said words to the effect that for all he knew, the Company might close down if the union got in. He also stated that he could work with or without a union but that he would prefer to be without. Eicherman did not think he had mentioned the possibility of a closure to Ogden. He stated, however, that he might have mentioned it to Guzina, although he could not specifically recall doing so. It should be stated here that the statement attributed to Eicherman by Sihota was not included in the particulars of employer misconduct which were furnished to the respondent on the day of hearing and that neither Ogden nor Guzina were asked questions regarding any statements which Eicherman might have made to them privately. Sihota's evidence was that the possibility of a closure had not been mentioned by either Eicherman or Whelan at the July 21st meeting with the committee.

18. There is a natural suspicion which attaches to a statement of desire following closely upon a union organizing campaign. The Board must assure itself that the "change of heart" indicated by employees who sign a petition in opposition to a union, after having previously indicated their support therefor, is a free choice, unimpaired by overt or subtle pressures. Where the evidence discloses that there has been interference by the employer in either the origination, preparation or circulation of a petition, or that unintentional acts or tacit behaviour by management served to create a climate which thwarted voluntary expression, it will be rejected by the Board on the ground that it does not represent a voluntary expression of employee desires. The Board's approach to petitions is based on a frank recognition of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on the freedom which The Labour Relations Act guarantees employees to select or reject a trade union as bargaining agent.

19. On the evidence before it, the Board must conclude that the employer took no part in the origination, preparation or circulation of the statement of desire. The evidence is

that the respondent took immediate steps upon learning of the efforts of the objectors to circulate a petition to disassociate itself from those efforts. That these steps were taken with a view to avoiding the possibility of the petition being found by the Board to have been encouraged or condoned by management, which is obviously the case, cannot, in the absence of such finding, negate the voluntariness of the employees' statement. It should be stated here that the Board does not consider the petition to be tainted by reason of the fact that its aborted precursor – petition number one – was circulated on company premises during working hours. Although he attempted to conceal from the Board the full extent of his involvement with management, Ogden made no secret of the fact that an earlier petition had been circulated among employees. In the Board's view, the circumstances surrounding the circulation of the first petition were not such as to unduly influence employees signing the second. The second statement was circulated outside the plant and outside working hours, and while it was alleged that some of the signatures were obtained by a means of a misrepresentation – with respect to its purpose – there was no allegation that the petitioners had made statements to employees of a threatening or coercive nature. In such circumstances, it cannot be assumed that employees believed the petitioners to have the support – tacit or otherwise of management.

20. Counsel for the applicant asked that the Board infer – from the fact that the petition originated following a discussion in which the respondent's plant manager had suggested to a bargaining committee member that a closure might follow a successful application, and from the fact that Eicherman might have made a similar statement to Guzina if not Ogden – that the petition was encouraged by management. A statement of the kind made by Eicherman, if found to have been communicated to a petitioner, might, in other circumstances, have supported an inference of management encouragement of the petition. Such an inference might be drawn irrespective of the motivation of the employer and irrespective of the fact that the statement predated – in this case by several days – the union's application for certification. Where, however, as here, the petitioners had, as members of an association committee, a vested and obvious interest in opposing the union, and where, as here, there was no evidence that the petitioners had mentioned the possibility of a closure to employees, the Board does not consider that such an inference can reasonably be drawn.

21. We turn now to the main attack which was made on the petition, namely, that the signatures were obtained by means of misrepresentation. The evidence disclosed a direct conflict in testimony with respect to what was said to employees. The employees (Ramrattan, Lelbeharry and Sabadello) all denied being told the petition was against the union. In Ramrattan and Lelbeharry's case, there was an allegation they had been told it was not. The petitioners (Ogden, and more specifically McGonigle) both testified that the purpose of the petition, and its opposition to the union, was made clear to employees.

22. In support of his contention that the employee's version of events should be accepted, counsel for the applicant pointed to the deficiencies in Ogden's testimony and asked that the Board give no credit to the evidence of the petitioners where it was in conflict with that of the employees.

23. The task of the Board in matters of this kind is to choose the version of events which appears most credible in the particular circumstances before it. The fact that in this case the testimony of one of the petitioners has been shown in certain respects to have been

less than forthcoming is obviously a factor which must be considered by the Board in assessing the credibility of the witnesses. It is not, however, the only factor to be considered. If the petition is to be rejected as having been obtained by means of a misrepresentation, the Board must still be persuaded, on the balance of probabilities, that the misrepresentation alleged by employees occurred. In deciding that question, the Board must consider the evidence in its totality, and cannot conclude simply from the fact that one of the petitioners has been less than forthcoming on the matter of his involvement with management that the employees' account of the circumstances surrounding the obtaining of signatures is an accurate one.

24. There are a number of features of the evidence which cause the Board to question the accuracy of the employees' version of events. First, their story is, on the face of it, a rather unlikely one. It is credible only if one accepts their belief that they would be approached in the period following the posting of the Board's notice (Form 5) and asked by employees to sign a document which had nothing to do with the union. Such a belief is all the more unlikely in the case of Ramrattan who had been approached by Ogden just four days earlier and asked to sign a petition which he knew opposed the union.

25. The employees' explanation of why they signed the petition – that their signatures were necessary to allow the employer to make an offer on the day of hearing – is also difficult to accept. We note the point made by counsel for the applicant that The Labour Relations Act imposes a freeze on wages and working conditions in the period following the making of an application for certification. However, both employees professed total ignorance of the labour laws of this province.

26. A third reason to question the accuracy of the employees' account is that they were given, by their own admission, an opportunity to read the petition before signing it. The Board does not take the position that employees who choose not to read a petition can never plead ignorance of what they sign – that was the position urged upon us by counsel for the objectors. We do, however, begin from the premise that employees who sign documents in the labour relations context – be they applications for membership or statements in opposition – know what they are signing. Employees claiming ignorance of what they sign must, if their evidence is to be accepted, provide the Board with an explanation for their conduct which is both credible and convincing in all the circumstances of the case. It is not enough to simply assert, as did Ramrattan, that he trusted a petitioner and took his word, particularly where, as here, the employee was also being solicited by someone he knew to be an opponent of the union and where, as here, the employee did not sign until after he had taken time to consider the matter.

27. A fourth factor of concern to the Board is that the misrepresentation alleged by Ramrattan and Lebeharry was not alleged by Sabadello. Sabadello's evidence, it will be remembered, was that he signed the petition after he was told only that it was to obtain a vote. This, despite the fact that he had read the preamble and knew Bruce to be opposed. It is possible, of course, that a selective approach to the obtaining of signatures was adopted. The Board, however, is at a loss to appreciate why Ramrattan and Lebeharry, both of whom are lead hands, would have been regarded by the petitioners as gullible enough to sign for the reasons alleged.

28. It should be emphasized that the Board's assessment of the credibility of the peti-

tioners' evidence on the matter of the petition's circulation need not rest upon the testimony of Tom Ogden alone. Bruce McGonigle gave evidence in reply which was directly contrary to the evidence of the employees. By contrast with Ramrattan and Lalbeharry, both of whom appeared uncomfortable under cross-examination, McGonigle delivered his evidence in a straightforward and convincing manner.

29. For the reasons stated, the Board is not persuaded that the misrepresentation alleged by Ramrattan and Lalbeharry occurred. The Board finds that Ramrattan, Lalbeharry and Sabadello either knew or ought to have known that the document they signed was in opposition to the union and that their signatures were voluntarily affixed.

30. The Board finds that the statement of desire is timely and a voluntary expression of the true wishes of the employees who signed it.

31. The Board orders that a representation vote be taken. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment, or who are not discharged for cause between the date hereof and the date the vote is taken, will be eligible to vote.

32. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

33. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent. I agree with the majority of the Board in that the employer had no part in the origin, preparation or circulation of the petition that would cause the Board to find it not a voluntary expression of the true wishes of the employees. However, I would give the petition no weight because of the misrepresentation of its purpose when presented for signature to at least two employees, Ramrattan and Lalbeharry, by Tom Ogden (para. 12 and 14).

2. There is no evidence that the employee witnesses were or are union activists and therefore presumed knowledgeable concerning labour law. The majority in para. 25 express a doubt that the applicant witnesses professed innocence of the law was indeed genuine. However, an examination of the membership cards filed by the trade union in this application, discloses that the names of Ramrattan, Lalbeharry and Sabadello do not appear as collector on any cards. I believe the testimony of these witnesses is supported by that fact, (para. 23 and 24). I find no reason to doubt their testimony.

3. Tom Ogden, the in-plant Association chairman and the chief petitioner, was found by the majority to be "less than forthcoming with the Board." I concur in that assessment (para. 9).

4. Considering all of the evidence, and particularly in the circumstances of this case, I would dismiss the petition and certify the trade union.

5. I would further critically comment that the documents given to Tom Ogden by Eicherman (para. 8) clearly indicate the adversary role which an employer might adopt to oppose a trade union. In my view the public interest desirous of harmonious relations between employers and employees would not be well served by an employer battle plan based on those documents, were resistance to union organization to take the form indicated.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1978

BARGAINING AGENTS CERTIFIED DURING SEPTEMBER

No Vote Conducted

1061-77-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Limestone Quarries Division of King Paving and Materials, A Division of the Flintkote Company of Canada Limited (Respondent).

Unit: "all dependent contractors owner/operators working at or out of the respondent's pit at Rouge Valley yard, Milliken, Ontario." (5 employees in the unit).

1971-77-R: Ontario Nurses' Association (Applicant) v. Little's Nursing Home (Tecumseh) Limited (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Tecumseh Nursing Home, save and except the director of nursing and persons above that rank." (10 employees in the unit). (*clarity note* – see Report of full decision (1978) Rep. September).

1992-77-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Haldimand Norfolk (Respondent) v. London and District Service Workers' Union, Local 220 (Intervener) v. Group of Employees (Objectors).

Unit: "all office and clerical and technical employees of the Respondent in the Regional Municipality of Haldimand Norfolk, save and except Supervisors and persons above the rank of Supervisor, persons employed in the Health Unit, persons employed in Municipal Homes for the Aged, persons covered by subsisting collective agreements and/or collective bargaining certificates, persons regularly employed for not more than 24 hours per week and Students employed during the school vacation period." (90 employees in the unit). (*Having regard to the agreement of the parties*).

2012-77-R: International Ladies' Garment Workers' Union (Applicant) v. Holiday Knitwear Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, supervisors, and persons above the rank of supervisor, office and sales staff, designers, mechanics, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (71 employees in the unit).

0484-78-R: Ontario Nurses' Association (Applicant) v. Leisure World Nursing Homes Limited (Respondent).

Unit: "all registered and graduate nurses engaged in a professional nursing capacity by the Respondent at Scarborough, Ontario, save and except the Director of Nursing, the Assistant Director of

Nursing, the Co-ordinating Supervisor, the Evening Supervisor, the Night Supervisor, and the Weekend Supervisor.” (59 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision (1978) OLRB Rep. September*).

0513-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Penwood Properties Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foremen.” (7 employees in the unit).

0517-78-R: United Steelworkers of America (Applicant) v. MacKenzie Milne and Co. Ltd. (Respondent).

Unit: “all employees of the respondent at Sarnia, save and except managers and persons above the rank of manager..” (2 employees in the unit).

0532-78-R: The United Brotherhood of Carpenters and Joiners of America (Applicant) v. M. Sullivan and Son Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foremen.” (7 employees in the unit).

0561-78-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. VS Services Ltd. (Respondent).

Unit: “all office and clerical employees of the respondent in Chatham, save and except the divisional manager, route supervisors, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (4 employees in the unit).

0686-78-R: International Association of Bridge, Structural and Ornamental Ironworkers Local Union 721(Applicant) v. Anvil Metal Industries Limited (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

0708-78-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 1747, 3227 and 3233, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Scarborough Shopping Centre Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*clarity note – see Report of full decision (1978) OLRB Rep. September*).

0715-78-R: Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers (Applicant) v. Diversey (Canada) Limited and Diversey Environmental Products Limited (Respondents) v. Group of Employees (Objectors).

Unit #1: "all employees of Diversey (Canada) Limited, at the City of Mississauga, save and except foremen, persons above the rank of foreman, sales staff, office, clerical and technical employees, persons employed for not more than 24 hours per week and students employed during the school vacation period." (55 employees in the unit). (*Having regard to the description agreed upon by the parties*). (*Certified*).

Unit #2: "all employees of Diversey Environmental Products Limited at the City of Mississauga, save and except foremen, persons above the rank of foreman, sales staff, office, clerical and technical employees, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the description agreed upon by the parties*). (*Dismissed*).

0741-78-R: Amalgamated Transit Union, Local 1585 (Applicant) v. The Hamilton Street Railway Company (Respondent).

Unit: "all salaried employees of Hamilton Street Railway Company in the Province of Ontario, save and except the following: supervisors, chief inspector, garage superintendent, general foremen, chief dispatcher, clerk-typist to the manager of operations, stenographer to comptroller, budget control officer, employee benefits officer, claims adjusters, secretary to the director of personnel, secretary to the general manager, chief payroll clerk, and those above those ranks, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation periods, and casual labour." (152 employees in the unit). (*Having regard to the agreement of the parties*).

0809-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. A & N Masonry Co. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0856-78-R: Wood, Wire and Metal Lathers International Union, Local 562 (Applicant) v. Western Ontario Drywall Limited (Respondent).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. September).

0859-78-R: Labourers' International Union of North America, Local 247 (Applicant) v. John Gordon Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Townships of Elizabethtown, Augusta, and Edwardsburgh and all lands south thereof (there are three Municipalities south of these townships: Brockville, Prescott and Cardinal) in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit).

0866-78-R: Service Employees Union, Local 478 (Applicant) v. Kirkland and District Hospital (Respondent).

Unit: "all employees of Kirkland and District Hospital, Kirkland Lake, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, graduate and student dietitians, graduate and undergraduate pharmacists, technical personnel, office and clerical staff and persons covered by subsisting collective agreements." (34 employees in the unit). (*Having regard to the agreement of the parties*).

0870-78-R: Shopmen's Local Union No. 734 of the International Association of Bridge Structural and Ornamental Iron Workers (Applicant) v. Lackie Bros. Limited (Respondent).

Unit: "all employees employed by the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office staff, employees engaged in field erection or construction work, employees covered by subsisting agreements, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and engineering students on Co-op program." (40 employees in the unit). (*Having regard to the agreement of the parties*).

0871-78-R: Hotel and Restaurant Employee's and Bartender's International Union Local 756 (Applicant) v. The Royal Tavern (Respondent).

Unit: "all employees of the respondent at the Royal Tavern in Dunnville Ontario, save and except managers and persons above the rank of manager." (6 employees in the unit).

0875-78-R: Graphic Arts International Union, Local 542 (Applicant) v. Thompson Printing Company (Respondent).

Unit: "all employees in the employ of the respondent in the City of Hamilton, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0878-78-R: International Chemical Workers Union (Applicant) v. Can-Eng Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at Niagara Falls, Ontario save and except foremen, those above the rank of foreman, office and sales staff." (24 employees in the unit).

0886-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Cedar Park Engineering & Construction Inc. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0887-78-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Cloverlawn Investments Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0888-78-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Edwards Sudbury Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0889-78-R: Christian Labour Association of Canada, Local #150 (Applicant) v. Neath & Associates Limited (Respondent).

Unit: "all cement masons, cement masons' apprentices and construction labourers in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0891-78-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Whitman Contracting Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0900-78-R: Oil, Chemical & Atomic Workers International Union (Applicant) v. Jongro Rubber Company Limited (Respondent).

Unit: "all employees of the respondent at its Bren Road plant, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in the unit). (*Having regard to the agreement of the parties*).

0903-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pointer Enterprises Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

0904-78-R: Retail, Wholesale and Department Store Union, AFL: CIO: CLC: (Applicant) v. Metropolitan Stores of Canada Limited (Respondent).

Unit: "all office and clerical employees of the Respondent at its retail stores in Timmins." (3 employees in the unit).

0907-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lenford Construction Limited (Respondent).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0908-78-R: Ontario Nurses' Association (Applicant) v. Parry Sound District General Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity at Parry Sound District General Hospital, Parry Sound, save and except Head Nurses and persons above the rank of Head Nurses and nurses employed for less than 24 hours per week." (59 employees in the unit). (*Having regard to the agreement of the parties*).

0910-78-R: Graphic Arts International Union, Local 28-B (Applicant) v. Sinclair and Valentine Company of Canada Limited (respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its premises at 4590 Dufferin Street in Downsview, save and except supervisors, persons above the rank of supervisor, office and clerical staff, sales staff and students employed during the school vacation period." (88 employees in the unit). (*clarity note* – see Report of full decision (1978) Rep. September).

0913-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions 785, 1316, 1617 and 2041 (Applicant) v. Frosst Construction (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. September).

0917-78-R: United Brotherhood of Carpenters and Joiners of America, A.F.L. C.I.O. C.L.C. (Applicant) v. Canbuild Management Services Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

0922-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Metal Improvement Company Inc. Mican Division (Respondent).

Unit: "all employees of the respondent in Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (11 employees in the unit).

0932-78-R: Canadian Transportation Workers Union No. 188 National Council of Canadian Labour (Applicant) v. Bill Thompson Transport Limited (Respondent).

Unit: "all owner operators (brokers) of the respondent working at or out of St. Thomas, save and except foremen, persons above the rank of foreman, office staff, and sales staff." (34 employees in the unit).

0935-78-R: Brewery, Soft Drinks, Distillery, Distributors and Miscellaneous Workers Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. G. Petrucci and Son Limited (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario save and except foremen, persons above the rank of foreman and office staff." (50 employees in the unit). (*Having regard to the agreement of the parties*).

0939-78-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Domtar Inc. (Respondent).

Unit: "all warehouse employees employed by the respondent at its distribution centres at 6789 Airport Rd., Mississauga, Ontario and 41 Butterick St., Etobicoke, Ontario save and except foremen, those above the rank of foreman, office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0954-78-R: United Steelworkers of America (Applicant) v. Hilkron Steel A Division of Vandenberg Metal Works Ltd. (Respondent).

Unit: "all employees of the respondent company in Mississauga save and except foremen, persons above the rank of foreman, office, technical and sales staff, draftsmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (64 employees in the unit).

0956-78-R: Christian Labour Association of Canada, Local #150 (Applicant) v. Provident Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*having regard to the foregoing*).

0960-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Peter Construction (Ottawa Ltd.) (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0964-78-R: Christian Labour Association of Canada (Applicant) v. United Mennonite Home for the Aged (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Lincoln, save and except housemother, adjutant, activity director, head nurse, bookkeeper, registered nurses, supervisors, persons above the rank of supervisor and office staff." (42 employees in the unit). (*Having regard to the agreement of the parties*).

0975-78-R: United Steelworkers of America (Applicant) v. Dynes Wismer Limited (Respondent).

Unit: "all employees of the respondent company in the Township of Oro, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff." (22 employees in the unit).

0982-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Forbys Management Limited (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above

the rank of foremen, persons above the rank of foreman and office and sales staff." (14 employees in the unit).

0984-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Skyview Forming Ltd. and Masonry Division (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0987-78-R: Canadian Chemical Workers Union (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: "all employees of the respondent at Sudbury, Ontario, save and except foremen, persons above the rank of foreman, registered pharmacists, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0995-78-R: Local and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Sunbeam Home (Respondent).

Unit: "all employees of the respondent at Kitchener, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, supervisors, persons above the ranks of foreman and supervisor, professional nursing staff and office staff." (28 employees in the unit).

0996-78-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Robert McAlpine Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1000-78-R: Service Employees Union, Local 268 (Applicant) v. Backs & Associates (Respondent).

Unit: "all employees of the respondent employed in the Van Daele Manor in Sault Ste. Marie, save and except supervisors, foremen, persons above the rank of supervisor or foreman, persons employed for not more than 24 hours per week and persons covered by subsisting collective agreements." (7 employees in the unit).

1001-78-R: Service Employees Union, Local 268 (Applicant) v. Backs & Associates (Respondent).

Unit: "all employees of the respondent in the Van Daele Manor in Sault Ste. Marie, regularly employed for not more than 24 hours per week, save and except supervisors, foremen, persons above the rank of supervisor or foreman, and persons covered by subsisting collective agreement." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1003-78-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Emco Supply Limited (Respondent).

Unit: "all employees of the respondent working at St. Catharines save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period." (6 employees in the unit).

1010-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rental Excavating Ltd. (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of the Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1011-78-R: United Steelworkers of America (Applicant) v. Nordic Engine and Machine Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent company at Sudbury save and except foremen persons above the rank of foreman, office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1023-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Montval Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1030-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Robert McAlpine Ltd. (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1035-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ishii Bros. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1036-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Pentagon Construction Co. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1038-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pointer Enterprises Limited (Respondent).

: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

1040-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Academy Property Management Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing vote

1196-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. C. Chewter & Son (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener).

Unit: "all plasterers and plasterers' apprentices employed by the respondent on residential building projects in and out of the City of Hamilton, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Number of persons on revised voters' list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	0	

0047-78-R: Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, CLC (Applicant) v. Export Packers Company Limited (Respondent).

Unit: "all employees of the respondent at its plant in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in the unit).

Number of names of persons on revised voter's list		33
Numbers of persons who cast ballots		29
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	11	

0493-78-R: Canadian Union of Public Employees (Applicant) v. Carefree Lodge (Respondent) v. The Employees' Association of Carefree Lodge (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except professional medical staff, supervisors, persons above the rank of supervisor, office & clerical staff, and persons covered by subsisting collective agreements." (33 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		30
Number of persons who cast ballots	25	
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of no union	1	
Number of ballots marked in favour of intervener	14	

0906-78-R: Canadian Transportation Workers Union No. 188 National Council of Canadian Labour (Applicant) v. Watson Concrete Products Limited (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener).

Unit: "all employees of the respondent, working in or out of its Chatham Plant, save and except foremen, persons above the rank of foremen, office staff, sales staff, and persons regularly employed for not more than twenty-four (24) hours per week." (23 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. September).

Number of names of persons on revised voters' list		22
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant	19	
Number of ballots marked in favour of intervener	2	

Applications Certified Subsequent to Post-Hearing Vote

0362-78-R: Ontario Hydro Employees Union, Local 1000 (Applicant) v. Ontario Hydro (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: "all employees of the respondent at its J. Clark Keith generating station at Windsor, save and except shift supervisors, foremen, persons above the rank of foreman, office staff, electrical operators and technicians." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	9	
Number of ballots marked in favour of intervener #1	1	

0694-78-R: London and District Service Worker's Union Local 220 (Applicant) v. Delhi Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener).

- and -

0695-78-R: London District Service Workers' Union Local 220 (Applicant) v. Delhi Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all employees of Delhi Nursing Home at Delhi, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, and office staff." (43 employees in the unit).

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	29	
Number of ballots marked in favour of the applicant	23	
Number of ballots marked in favour of the intervener	6	

0808-78-R: Canadian Union of Public Employees (Applicant) v. St. Catharines Public Library Board (Respondent).

Unit: "all employees of the respondent at all branches of the Library in the City of St. Catharines, save and except the Director, Co-ordinator Central Library, Co-ordinator acquisitions and technical services, Business Administrator, Department Heads including Building Superintendent, persons above the rank of Department Head, Secretary to the Director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (40 employees in the unit).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots		37
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	14	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

2147-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. C. Chewter & Son Plaster (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener). (4 employees).

0364-78-R; 0365-78-R; 0366-78-R; 0367-78-R; 0368-78-R; 0369-78-R; 0370-78-R; 0371-78-R; 0372-78-R; 0373-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Adath Israel Congregational School, Associated Hebrew Schools of Toronto, Beth Shalom Congregational School, Beth Tikvah Congregational School, Beth Tzedec Congregational School, Bialik Hebrew Day School, Community Hebrew Academy of Toronto, Eitz Chaim Schools, United Congregational Schools, and United Synagogue Day School (Respondents). (214 employees).

0539-78-R: Service Employees International Union (Applicant) v. Western Fair Association (Respondent). (126 employees).

0606-78-R: Canteen of Canada Employee Association (Applicant) v. Canteen of Canada Limited (Respondent) v. Retail Clerks Union, Local 206 (Intervener). (26 employees).

0733-78-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. G.K.S. Restaurants Ltd. operating as Our Place Restaurant and Tavern (Respondent). (23 employees).

0757-78-R: Canadian Union of Public Employees (Applicant) v. St. Lawrence Estate (Respondent). (33 employees).

0872-78-R: International Association of Machinists & Aerospace Workers, District Lodge 717 (Applicant) v. Strippit Houdaille of Canada, a division of Houdaille Industries of Canada Limited (Respondent) v. Group of Employees (Objectors). (6 employees).

0923-78-R: United Brotherhood of Carpenters & Joiners of America Local #494 (Applicant) v. Bek-aert Industrial Limited (Respondent) v. Christian Labour Association of Canada (Intervener). (21 employees).

0951-78-R: Ontario Nurses' Association (Applicant) v. Oaklands Regional Centre (Respondent). (10 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1932-77-R: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. Armoured Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Labourers' International Union of North America, Local 183 (Intervener #2).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (32 employees).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	25	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener #2	17	

Certification Dismissed Subsequent to Post-Hearing Vote

1044-77-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Hunt Lumber and Builder's Supplies Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Lambeth, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week." (22 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	14	

0710-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Pepsi-Cola (Canada) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Pickering, save and except foremen persons above the rank of foreman, office staff and students employed during the school vacation period." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	16	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0711-78-R: International Association of Bridge, Structural and Ornamental Iron Workers – Local Union 700 (Applicant) v. Robertson Yates Corp. Limited (Respondent). (3 employees).

0772-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. King Paving & Materials Division of the Flintkote Company of Canada Limited (Respondent). (15 employees).

0883-78-R: Air Care Inc. Smiths Falls Employees Association (Applicant) v. Air Care Inc. Smith Falls Plant P.O. Box 876 (Respondent). (7 employees).

0926-78-R: International Beverage Dispenser's and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Organ Grinder Ltd. (Respondent). (2 employees).

0950-78-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsman (Applicant) v. Celtic Construction London Limited (Respondent). (6 employees).

0952-78-R: Retail Clerks Union Local 206 Chartered by the Retail Clerks International Association (Applicant) v. Coles the Book People (Respondent). (13 employees).

0986-78-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Adelaide Maintenance Limited (Respondent). (35 employees).

1002-78-R: The Canadian Union of Public Employees Local 258 (Applicant) v. The Corporation of the Town of Leamington (Respondent). (3 employees).

1027-78-R: Teamsters Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Hancock Sand and Gravel Limited (Respondent). (45 employees).

1058-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ranac Forming Limited (Respondent). (8 employees).

APPLICATIONS UNDER SECTION 1(4)

0413-78-R: United Steelworkers of America (Applicant) v. Crown Cork and Seal Company Limited, and Crown Cork and Seal Company Inc. (Respondents). (2 employers). (*Dismissed*).

0535-78-R: The Toronto Building and Construction Trades Council; International Union of Bricklayers and Allied Craftsmen, Local 2, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 2 (Applicants) v. West York Construction Limited, and Bau Canada Limited (Respondents). (2 employers). (*Granted*).

0776-78-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Steds Limited and Stedsteel Buildings (Respondents). (2 employers). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1569-77-R: Barry Polkinghorne (Applicant) v. Local Union 1687, International Brotherhood of Electrical Workers (Respondent) v. M. G. Burke Investments Ltd. (Intervener). (3 employees). (*Dismissed*).

0218-78-R: Lloyd Gloster and Jack Falldien (Applicant) v. The Northern Ontario Newspaper Guild, Local 232 The Newspaper Guild (CLC, AFL-CIO) (Respondent) v. The Sudbury Star (Intervener). (39 employees). (*Dismissed*).

0675-78-R: Cullen E. Russell (Applicant) v. International Brotherhood of Electrical Workers Local 636 (Respondent). (*Dismissed*).

Unit: "all employees of The Public Utility Commission of the City of Stratford, Transportation Department, in its Transportation Department save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative training basis." (22 employees in the unit).

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	19	
Number of ballots marked in favour of Respondent	14	
Number of ballots marked against Respondent	5	

0701-78-R: Employees of Ellwood Robinson Construction Co. Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Ellwood Robinson Limited (Intervener). (*Granted*).

Unit: "all employees of Ellwood Robinson Limited working within the City of Sault Ste. Marie, and within a radius of thirty-five miles of the said City of Sault Ste. Marie City Hall save and except foremen, persons above the rank of foreman, watchmen, technical and office staff and students hired for the summer vacation period." (74 employees in the unit).

Number of names of persons on revised voters' list		60
Number of persons who cast ballots	53	
Number of ballots marked in favour of respondent	9	
Number of ballots marked against respondent	44	

0752-78-R: Joseph Bordin (Applicant) v. International Union of Operating Engineers Local 793 (Respondent). (*Granted*).

Unit: "all employees of Geo. W. Crothers (1965) Limited employed at and out of Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		7
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	7	

0830-78-R: Lou Fazekas (Applicant) v. Retail, Wholesale and Department Store Union, Local 579 (Respondent) v. International Hotel (Sudbury) Ltd. (Intervener). (2 employees). (*Granted*).

0912-78-R: Employees of Rondar Services Ltd. (Applicant) v. I.B.E.W. Union Local 105 (Respondent) v. Rondar Services Ltd. (Employer). (2 employees). (*Dismissed*).

0965-78-R: George L. Gray (Applicant) v. International Brotherhood of Teamsters, Warehousemen and Helpers, Local Union 141 (Respondent) v. L.E. Walker Transport Limited (Intervener). (14 employees). (*Withdrawn*).

1006-78-R: Thom Bell (Applicant) v. Warehousemen and Miscellaneous Drivers, Local 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Cleanol Services (Intervener). (72 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

0591-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. Peerless Plastics Limited (Respondent). (*Granted*).

0760-78-R: Canadian Union of Public Employees (Applicant) v. Catholic Children's Aid Society of Metropolitan Toronto (Respondent) v. Group of Employees (Objectors). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0936-78-U: Acme Building and Construction Limited (Applicant) v. Carpenters District Council of Toronto and Vicinity and Torrance Ferrier (Respondents). (*Withdrawn*).

0981-78-U: Butler Metal Products Co. Ltd. (Applicant) v. Gary Abraham et al (Respondents). (*Withdrawn*).

0990-78-U: George Lanthier & Fils Ltee. (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, William Overy, et al (Respondent). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0977-78-U: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Union (Applicant) v. Golden Arrow Inflight Catering Services Ltd. (Respondent). (*Withdrawn*).

0947-78-U: United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Applicant) v. Danway Industries Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0901-76-U: Local 550, Canadian Food and Allied Workers Chartered by the Amalgamated Meat Cutters and Butcher Workmen (Complainant) v. Culverhouse Foods Incorporated (Respondent). (*Granted*).

1639-77-U: International Brotherhood of Electrical Workers, Local 1687 (Complainant) v. M. G. Burke Investments Limited (Respondent). (*Withdrawn*).

0003-78-U: United Steelworkers of America (Complainant) v. Great Lakes Steel Limited (Respondent). (*Withdrawn*).

0133-78-U: Service Employees Union, Local 183 (Complainant) v. Lennox and Addington County General Hospital (Respondent). (*Granted*).

0274-78-U: United Steelworkers of America (Complainant) v. Radio Shack Division of Tandy Electronics Limited (Respondent). (*Granted*).

0434-78-U: Spar Professional and Allied Technical Employees Association (Complainant) v. Spar Aerospace Products Limited (Respondent). (*Granted*).

0467-78-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Super Disposal Services Ltd. (Respondent). (*Granted*).

0546-78-U: Ontario Nurses' Association (Complainant) v. St. Magdalene Nursing Home (Respondent). (*Withdrawn*).

0689-78-U: United Brotherhood of Carpenters & Joiners of America (Complainant) v. Danway Industries Ltd. (Respondent). (*Granted*).

0731-78-U: Alliance Employees' Union (Complainant) v. Public Service Alliance of Canada (Respondent). (*Granted*).

0790-78-U: Retail Clerks Union, Local 1977, Chartered by the Retail Clerks International Union (Complainant) v. Zehrs Markets Division of Zehrmart Limited (Respondent). (*Withdrawn*).

0791-78-U: Retail Clerks Union Local 1977, Chartered by the Retail Clerks International Union (Complainant) v. Zehrs Markets Division of Zehrmart Limited (Respondent). (*Withdrawn*).

0795-78-U: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Union (Complainant) v. Golden Arrow Inflight Catering Services Ltd. (Respondent). (*Withdrawn*).

0810-78-U: Canadian Union of Public Employees (Complainant) v. Nel-Gor Castle Nursing Home (Respondent). (*Withdrawn*).

0811-78-U: Canadian Union of Public Employees (Complainant) v. Nel-Gor Castle Nursing Home (Respondent). (*Withdrawn*).

0816-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L. CIO-CLC (Complainant) v. Oakwood Hotel (Toronto) Limited, Known as Oakwood Hotel (Respondent). (*Granted*).

0855-78-U: Canadian Union of Public Employees (Complainant) v. Nel-Gor Castle Nursing Home (Respondent). (*Withdrawn*).

0863-78-U: Andras L. Antal (Complainant) v. Joseph N. Burkholder (Respondent). (*Dismissed*).

0881-78-U: Mr. Joseph Vella (Complainant) v. United Glass and Ceramic Workers of North America (Respondent). (*Withdrawn*).

0893-78-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Wilkinson Foundry, Facings and Supply Co. Limited (Respondent). (*Withdrawn*).

0895-78-U: Office and Professional Employees' International Union, Local 225 (Complainant) v. Canada Employment and Immigration Union (Respondent). (*Withdrawn*).

0901-78-U: John St. Hilaire (Complainant) v. U.A.W. Canada (Respondent) v. Chrysler Canada Ltd. (Intervener). (*Dismissed*).

0911-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.C. (Complainant) v. Churchill Restaurant Limited (Respondent). (*Withdrawn*).

0925-78-U: Sandra Tolhurst and Ethel Duncan (Complainants) v. United-Carr division of TRW Canada Limited and United-Carr Employees' Association (Respondents). (*Withdrawn*).

0937-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders International Union, AFL-CIO-CLC (Complainant) v. Cloverleaf Hotel Ltd., Known as: Cloverleaf Hotel (Respondent). (*Withdrawn*).

0943-78-U: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Margarets Fine Foods Limited (Respondent). (*Withdrawn*).

0945-78-U: Ontario Nurses' Association (Complainant) v. St. Magdalene Nursing Home Ltd. (Respondent). (*Withdrawn*).

0955-78-U: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Complainant) v. Gino Mroga, Labourers' International Union of North America Local 625, Don Steward, International Association of Bridge and Ironworkers Local 700, Essex and Kent Counties Building and Construction Trades Council, Ian Logan, Bill Roy, United Brotherhood of Carpenters and Joiners of America Local 494, Woodall Construction Company Limited (Respondents). (*Dismissed*).

0966-78-U: United Steelworkers of America (Complainant) v. H. Paulin & Co. Limited (Respondent). (*Withdrawn*).

0973-78-U: William McAinsh (Complainant) v. The Organ Grinder Ltd. (Respondent). (*Withdrawn*).

0989-78-U: Service Employees International Union (Complainant) v. Modern Building Cleaning, at Carleton University, Ottawa, a Division of Dustbain Enterprises Limited (Respondent). (*Withdrawn*).

0993-78-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks Limited (Respondent). (*Withdrawn*).

1005-78-U: International Ladies' Garment Workers' Union (Complainant) v. Pandella Fashions Limited (Respondent). (*Withdrawn*).

1012-78-U: International Bartenders and Beverage Dispensers Union Local 280 of the International Hotel and Restaurant Employees and Bartenders Union AFL CIO CLC (Complainant) v. Organ Grinder Ltd., carrying on business as the Organ Grinder Tavern (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 55

0387-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union No. 249 (Applicant) v. Hugh Murray Limited and Hugh Murray (1974) Limited (Respondents). (*Granted*).

0754-78-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141 (Applicant) v. Durham Transport Inc., L. E. Walker Transport Limited (Respondents). (*Dismissed*).

JURISDICTIONAL DISPUTE

0949-78-JD: H. Griffiths Company Limited (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0668-78-M: Canadian Union of Public Employees, Local 141 (Applicant) v. The Corporation of the City of Kingston (Respondent). (*Withdrawn*).

0827-78-M: United Garment Workers of America (Applicant) v. Bell Shirt 1978 Ltd. (Respondent). (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

0405-78-M: 370864 Ontario Limited, known as: Katrina's Tavern (Formerly Forge Tavern) (Employer) v. International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Trade Union). (*Granted*).

0522-78-M: The Board of Education for the City of London (Employer) v. Staff Association, Board of Education, London (Trade Union). (*Dismissed*).

0541-78-M: Genstar Chemical Limited (Employer) v. International Chemical Workers Union, Local 721 (Trade Union) v. Canadian Chemical Workers Union (Intervener). (*Granted*).

0663-78-M: M.W.M. Crane Service (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union). (*Dismissed*).

0664-78-M: 380611 Ontario Limited, known as Colonial Tavern (Employer) v. International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L. – C.I.O. – C.L.C. (Trade Union).

- and -

0666-78-M: 380611 Ontario Limited (Colonial Tavern) (Employer) v. International Beverage Dispensers' and Bartenders' Union, Local 280 (Trade Union). (*Granted*).

0896-78-M: Pitts Engineering Construction Limited (Employer) v. Teamsters Local Union 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Trade Union). (*Dismissed*).

0899-78-M: Windsor Tube & Metal Inc. (Employer) v. United Automobile Workers Local 195 (Trade Union). (*Granted*).

0976-78-M: Quality Craft Interiors Ltd. (Employer) v. United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112A

1908-77-M: Operative Plasterers' and Cement Masons' International Association of United States and Canada, Local Union No. 172 (Applicant) v. Neath Toronto Limited (Respondent). (*Withdrawn*).

0423-78-M: Local Union 552 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Mechanical Contractors Association of Windsor and Motor City Plumbing Limited (Respondent). (*Granted*).

0469-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Applicant) v. Mechanical Contractors Association – Sarnia and MacKenzie Black Fabricating Co. Limited (Respondent). (*Withdrawn*).

0766-78-M: Labourers' International Union of North America Local 183 (Applicant) v. Romano Construction Co. (Respondent). (*Withdrawn*).

0825-78-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Contractors' Section of the Toronto Construction Association, and Bloor Contractors Ltd. (Respondents). (*Granted*).

0829-78-M: Labourers' International Union of North America, Local Union 506 (Applicant) v. H. Griffiths Company Limited and The General Contractors' Section of the Toronto Construction Association (Respondents). (*Withdrawn*).

0894-78-M: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. R. M. Elliott Construction Ltd. (Respondent). (*Withdrawn*).

0902-78-M: A Council of Trade Unions acting as the representative and agent of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. Dufferin Construction Company (a division of Dufferin Materials and Construction Ltd.) (Respondent). (*Granted*).

0930-78-M: Labourers' International Union of North America Local 183 (Applicant) v. The Association of Concrete and Drain Contractors – and – D.I. Construction Company (Respondent). (*Terminated*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

0186-78-U: Local 1976, Pharmacists and Professional Employees Assoc. chartered by Retail Clerks International Union, CLC, AFL-CIO (Complainant) v. Hillsdale Nursing Home (Respondent). (*Request Denied*).



Labour
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Trade Union – Timeliness – Certification – Whether owner-operators of vehicles are dependent contractors.	
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1155-78-R Leonard S. Martin, (Applicant), v. Labourers' International Union of North America, Local 183, (Respondent)
 – v – **Cadillac Fairview Corporation Limited**, (Intervener).

Collective Agreement – Termination – Timeliness – Determination of when collective agreement begins to operate

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members M. J. Fenwick and J. D. Bell.

APPEARANCES: *Robin B. Cumine and Leonard S. Martin for the applicant; A. M. Minsky and B. Yandell for the respondent; Paula Rusak and E. Del Piero for the intervener.*

DECISION OF THE BOARD; November 23, 1978

1. This is an application for a declaration that Labourers' International Union of North America, Local 183 (hereinafter called "Local 183") no longer represents certain employees of Cadillac Fairview Corporation Limited who perform work associated with building maintenance and janitorial cleaning with certain exceptions not here relevant, at 441 Lawrence Avenue East, 7 and 9 Roanoke Avenue and 60-88 Cassandra Boulevard. The application was filed on October 6, 1978.

2. The respondent, Local 183, submits that the application is untimely, having regard to the provisions of a collective agreement made between it and the intervener and to the provisions of section 49 (2) (b) of The Labour Relations Act which are:

49.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.

3. The relevant sections of the collective agreement are set out below:

ARTICLE I – RECOGNITION:

1.01 The Employers Association for and on behalf of the Employers named in Schedule "A" attached hereto and forming part of this Collective Agreement, recognizes the Union as the sole collective bargaining agent for the Employees employed to perform all work associated with building maintenance and janitorial cleaning, including Resident Superintendents (as defined in Appendix "A" of this Collective Agreement) save and except Property Managers, Property Management office and clerical staff, or executive personnel in po-

sitions above Property Managers, at and out of such buildings, complexes of buildings or central maintenance departments as referred to in Schedule "A" hereto as the same may be amended or added to from time to time, it being understood that any additions to Schedule "A" shall be limited to buildings, complexes of buildings or central maintenance departments located within Ontario Labour Relations Board Construction Geographic area No. 8.

ARTICLE XXII – DURATION OF AGREEMENT AND CONTRACT REOPENER:

22.01 Subject to the Contract Reopener of this Article, this Agreement shall continue in full force and effect for a term of five years from December 1, 1975 until November 30, 1980 inclusive and thereafter shall be automatically renewed and remain in force from year to year from its expiration date unless, within the period of 90 days before the Agreement ceases to operate, either party gives notice in writing to the other party of its desire to bargain with a view to the renewal with or without modifications of the Agreement. On receipt of such notice the parties to the Agreement shall convene a meeting within 15 days and bargain in good faith to endeavour to reach an agreement.

SCHEDULE "A" TO AN AGREEMENT ENTERED INTO ON THE 4TH DAY OF MARCH, 1976 BETWEEN THE PROPERTY MANAGEMENT SERVICES ORGANIZATION AND THE LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183:

Address of Building, Complex of Buildings or Central Maintenance Department covered by this Agreement	Name & Address of Employer Covered By this Agreement	Date this Agreement effective from in relation to such building, complex of buildings or central Maintenance Dept.
441 Lawrence Avenue East 7 and 9 Roanoke Ave 60 - 88 Cassandra Blvd.	Cadillac Fairview Corp. Ltd.	March 1, 1976

4. It was the contention of the respondent that the collective agreement commenced to operate on March 4th, the date upon which it was executed by the parties. This would render the application premature since the thirty-fifth month referred to in section 49 (2) (b) had not yet been reached when the application was made.

5. The applicant contended that by virtue of Article 22.01 of the collective agreement its operation commenced on December 1, 1975 and that, consequently, the application had been made in accordance with section 49 (2) (b) and is timely.

6. There was agreement that the terms, provisions and conditions set out in the collective agreement were actually implemented and applied by Cadillac and the union on March 1, 1976 in accordance with the terms of the collective agreement.

7. In the wage schedules set out in Appendix "A", the first date to which the rates are related is December 1, 1975. The rates were paid to the employees affected retroactively to that date.

8. It is obvious that whether the agreement is found to have commenced to operate on December 1, 1975 or March 4th (or 1st) 1976, the agreement will fall within the provisions of sections 49 (2) (b) of the Act, since there can be no question that the expiration date is November 30, 1980 or later, subject to notice.

9. The Board has dealt with the question as to when a collective agreement commences to operate on a number of occasions. The position of the Board on this issue is set out in *R & R Pre-Cast Erectors*, [1968] OLRB Rep. May 172 where it is stated:

In the absence of any provision to the contrary, the Board has interpreted the commencement date of any collective agreement to be the date on which it was entered into by the parties (see *R.C.A. Victor Company Limited*, (1956) Canadian Labour Law Cases, Vol. 1, 1944-1959, ¶18,045). In the instant case, there is no provision in the agreement itself nor any extrinsic evidence that suggests that the parties envisaged any operative effect of the agreement prior to its execution. In these circumstances, in accordance with section 39 (1) of the Act, the collective agreement is deemed to remain in effect for a period of one year from September 20th, 1967, the date on which it commenced to operate. The application of the applicant therefore is untimely.

10. The foregoing was referred to in *Mortlock Construction (1963) Limited*, [1973] OLRB Rep. April 204 in which the Board approached the problem with the following considerations:

Upon considering the current collective agreement as a whole, the evidence before it and the representations of the parties, the Board finds that the collective agreement envisages an operative effect prior to its date of execution of October 11, 1972, and that it commenced its operation on May 1, 1972. Reference is made to the *R & R Pre-Cast Erectors Limited* case, [1968] OLRB Rep. 172 and to the *R.C.A. Victor Company Limited* case 56 CLLC ¶18, 045. Having regard to the provisions of section 5(4) of The Labour Relations Act, the Board finds that this application is timely.

11. Schedule "A" to the present agreement is incorporated into the collective agreement by Article 1 and it must be given effect as part of that agreement if at all possible. The Schedule is obviously directed toward the identification of the buildings, complexes of buildings, etc. of the employers named in the Schedule covered by the agreement at the effective date. Article 1 provides for additions to the list of buildings etc. limited only to those in Board Area No. 8. The Schedule then, as may be seen, states the date from which the agreement is effective with respect to the buildings set out in the Schedule. It would appear to follow that with respect to any additional buildings added to the list the effective date of the agreement would coincide with the date they were added to the Schedule. Schedule "A" therefore qualifies Article 22 in that it provides for different commencement dates by reason of the addition of buildings from time to time, all within the overall or umbrella five-year period set out in Article 22. Article 22 and Schedule "A" are, consequently, reconcilable.

12. It is abundantly clear from a reading of the collective agreement as a whole that the commencement date of its operation, is, as the parties have taken pains to explicitly set out, March 1, 1976.

13. The application is accordingly untimely.
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0334-78-R Retail, Wholesale and Department Store Union, AFL:
CIO:CLC, (Applicant), v. **Canada Dry Bottling Company (Kingston) Ltd.**,
(Respondent), Group of Employees, (Objectors).

Certification – Petition – Practice & Procedure – Reconsideration – Petitioning employees seeking adjournment to secure further witnesses to bolster credibility of a witness – No adjournment granted.

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members D. B. Archer and W. H. Wightman.

APPEARANCES: *H. Buchanan for the applicant; Walter Patridge and Joseph Carrier for the respondent; Kees W. Kort and John Dodds for the objectors.*

DECISION OF ARTHUR L. HALADNER, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER; November 9, 1978

1. This is an application for reconsideration of a decision of the Board dated June 15, 1978 certifying the applicant union as the bargaining agent for certain employees of the respondent company. Counsel for a group of objecting employees seeks reconsideration of that decision on a number of grounds, and submits that the Board should reopen its hearing, and hear further evidence. It should be noted at the outset that counsel's submissions merely expand upon those which he made at the initial hearing of this matter. Section 95 of the Act, granting the Board a discretion to reconsider its decisions, is not a vehicle to which a party can resort in order to reargue or supplement its case. There is nothing in these submissions of counsel which has not been raised, or could not, with due diligence have been raised, at the initial hearing. Nevertheless, in view of the nature of the submissions, the Board considers it appropriate to provide more detailed reasons for its decision not to reconsider.

2. This is an application by the union for certification for a bargaining unit of employees of the respondent more particularly described in paragraph 3 of the Board's decision of June 15th, 1978. In support of the application the union tendered membership evidence on behalf of approximately 65% of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining. There was no suggestion of irregularity, or impropriety, in the solicitation of this membership evidence. Having regard to the statutory definition of "member", and the character and contents of the documentary evidence of membership, the Board was satisfied that more than 55% of the employees in the bargaining unit at the time the application was made were members of the union on May 25, 1978, the terminal date fixed for the application which the Board determined, under section 92 (2) (j) of the Act to be the time for the purpose of ascertaining membership under section 7(1) of the Act. As a result of these findings (and they were not challenged) the Board was in a position to certify the applicant trade union, without ordering a representation vote.

3. Even though an applicant union has demonstrated membership support within the meaning of the Act sufficient for “automatic” certification, the Board retains a discretion pursuant to section 7(2) of the Act to direct a representation vote where it considers it advisable to do so. The Board will generally exercise its discretion in favour of ordering a representation vote where a sufficient number of employees have voluntarily indicated in writing that they have changed their mind with respect to trade union representation and that although they have signed membership application cards and paid membership fee (and are therefore “members” for the purpose of the Act) they now wish to oppose the certification. This employee expression commonly takes the form of a “petition” or “statement of desire”. Neither petitions nor statements of desire are specifically mentioned by the statute; however such expressions in opposition to certification are governed by Rule 48 of the Board’s Rules of Practice. In addition, the Board must be satisfied that this “change of heart” originated with the employees themselves, and was neither motivated, nor influenced, by their employer.

4. Generally, employers are opposed to trade union organization, and this viewpoint is well known to employees. If therefore, an employee’s views on this contentious issue are solicited by someone who either is, or could reasonably be thought to be acting on behalf of the employer, there will be a natural tendency to signify his opposition to the trade union rather than identify himself as a trade union supporter, and thus adverse in interest to his employer. Where an employee reasonably believes that the employer may be associated with a campaign opposing the union (or, less commonly a union organizing campaign) he will be prompted to express the views which he believes the employer would favour regardless of his real wishes in the matter. In such circumstances the Board can place little weight on the employee’s expression even though the employer may not actually have been involved in any improper attempt to influence him. Ultimately the weight to be given to such expressions for or against the union, will depend upon an assessment of the facts. (See for example *Veres Wire Limited* [1976] OLRB Rep. July 237) where the involvement in the union organization campaign of a person reasonably believed by the employees to be managerial prompted the Board to reject the membership evidence submitted on behalf of the union).

5. Where a petition is submitted to it, the Board will commonly undertake the inquiry contemplated by section 49 (5) of the Rules, and entertain evidence from a witness as to the circumstances concerning the origination of the petition, and the manner in which each signature on the petition was obtained. The purpose of this inquiry is to determine the weight to be given to the petition. If the Board is not satisfied that the origination and circulation of the petition is free from actual or perceived managerial influence, it will not exercise its discretion to order a representation vote.

6. In the instant case John Charles Dodds, the employee who prepared and circulated the statement of desire gave evidence that he approached the manager of the employer and inquired what he could do about the trade union’s organizing campaign. The manager directed him to an employee, one Steve Tysick, who the manager said would advise him what had to be done. Dodds testified that Tysick did in fact provide him with information as to how the opposition to the trade union should be organized. Subsequently, Dodds changed his evidence with respect to the role of the manager in referring him to Tysick. Tysick himself was not available at the hearing to give evidence and the Board did not accede to the request of counsel for an adjournment so that he might be located and brought in to testify as to his recollection of the events.

7. Having regard to the demeanour of the witness Dodds in the witness box, the manner in which he gave his evidence and the pattern of his responses, the Board was not persuaded that the alteration of his story reflected an imperfect recollection of the events which had occurred some two weeks prior to the hearing. Rather we were left with a serious doubt as to his credibility and, as has already been indicated, Dodds was the only witness testifying in support of the statement of desire.

8. When it became apparent that the Board was interested in the role of Tysick in the origination of the statements of desire, and was unsatisfied with the evidence of Dodds, counsel requested an adjournment in order to seek the attendance of Tysick. The Board is of the view that a party which finds itself in evidentiary difficulties is not entitled, as of right, to an adjournment in order to seek further witnesses to bolster its case. In this case, the objecting employees, and their counsel were aware, or ought to have been aware, that their representative would be required to testify concerning the origination of the statements of desire. This requirement is contained in Rule 48 of the Board's Rules of Practice and is reproduced on Form 5 – the Notice to Employees. In certification matters it is particularly important that all parties be prepared to prove their case on the date fixed for the hearing. Delays can often cause serious and irreparable prejudice to the applicant. As Estey, C.J.O. (as he then was) noted in *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild Local 205, OLRB et al* (unreported) March 31, 1977 C.A.) "labour relations delayed are labour relations defeated and denied". (See also *Komo Construction Incorporated v. Quebec Labour Relations Board et al*, 68 CLLC. para. 14108 (SCC)). Having regard to the balance of convenience, and the prejudice which would have arisen if these certification proceedings had been delayed, the Board was not prepared to grant the adjournment requested. In the result, therefore, the Board was not able to accord weight to the statements of desire and therefore declined to exercise its discretion to grant a representation vote.

9. The Board does not see anything in the submissions of counsel which would cause it to reconsider or vary that earlier decision. Accordingly, the application for reconsideration is dismissed.

DISSENT OF W. H. WIGHTMAN:

My dissent to the majority decision of July 12, 1978 is not affected by this application for reconsideration. With respect to this application I would merely observe that while it is reasonable to expect that representatives of employers and unions should be able to anticipate what may be required of them to establish a case before the Board, I feel it is rarely the case that individual employees or groups of employees can be expected to have foreknowledge of what may be required of them in petitioning the Board.

Certification – Construction Industry – Trade Union Status – Alleged designated employee bargaining agency seeking certification – No evidence of constitution led – Applicant only a part of designated agency – Application dismissed for failure to prove trade union status.

No. 0696-78-R IBEW Construction Council of Ontario, (Applicant), v. Courtland Electric Ltd., (Respondent).

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members E. Boyer and E. C. Went.

APPEARANCES: *T. Kuttner, R. Tersigni and J. McInnis for the applicant; Malcolm Southren for the respondent.*

DECISION OF THE BOARD; November 14, 1978

1. The name: "International Brotherhood of Electrical Workers Construction Council of Ontario" appearing in the style of cause of this application as the name of the applicant is amended to read: "IBEW Construction Council of Ontario". The name "Courtland Electric" appearing in the style of cause as the name of the respondent is amended to read: "Courtland Electric Ltd.".

2. This is an application for certification filed pursuant to the construction industry provisions of The Labour Relations Act.

3. At issue here is whether the applicant has the status of a trade union under the Act such as would allow it to be certified as the bargaining agent for a unit of employees. A trade union is defined by section 1 (1) (n) of the Act in the following terms:

In this Act,

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

4. At the hearing the Board indicated to the applicant that it was required to establish that it is a trade union within the meaning of the Act. At that point applicant's counsel filed with the Board a copy of an employee bargaining agency designation and stated that he would be relying exclusively on this document to establish the applicant's status as a trade union. Although invited by the Board to do so, counsel expressly declined to lead any evidence to establish the applicant's right to be certified as a council of trade unions and, more particularly, he stated that the applicant was not prepared to lead the evidence required by section 9 to establish that it is a council of trade unions whose constituent unions have vested appropriate authority in it to enable it to discharge the responsibilities of a bargaining agent.

5. Counsel's reliance on the employee bargaining agency designation is referable to the recent amendments to The Labour Relations Act which implement a system of multi-employer, province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. See: *The Labour Relations Amendment Act, 1977*, S.O. 1977 c.31. On the union side the Act contemplates the designation of "employee bargaining agencies" comprised of affiliated bargaining agents. The function of an employee bargaining agency is

to bargain with its counterpart on the employer side, known as an employer bargaining agency, on a province-wide, multi-employer basis for the industrial, commercial and institutional sector of the construction industry and to conclude a provincial collective agreement. To provide the employee bargaining agency with authority to engage in such bargaining, notwithstanding that actual bargaining rights rest with the affiliated bargaining agents, section 130 of the Act provides that all rights, duties and obligations under the Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency "but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement".

6. The relevant portion of the Minister's designation filed with the Board reads as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, *I hereby designate the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario as the employee bargaining agency to represent in bargaining in the industrial, commercial and institutional sector of the construction industry all Journeymen and Apprentice Electricians and Journeymen and Apprentice Linemen, represented by the International Brotherhood of Electrical Workers or locals 105, 115, 120, 303, 339, 353, 530, 586, 773, 804, 894, 1687 or 1739 of the International Brotherhood of Electrical Workers, or any other local of the International Brotherhood of Electrical Workers that might be chartered to represent Electricians or Linemen in the industrial commercial and institutional sector of the construction industry.*

(Emphasis added)

7. Applicant's counsel took the position that the above referred to portion of the designation had the effect of making the applicant a designated employee bargaining agency. Having regard to the fact that section 1 (1) (n) of the Act defines a designated employee bargaining agency as a trade union, contended counsel, it follows that the applicant is a trade union for all purposes of the Act and accordingly is eligible to bring an application for certification as the bargaining agent for a unit of employees of a specific employer.

8. Although it might be argued that the Act intended a designated employee bargaining agency to have the status of a trade union only for the limited purposes set forth in section 130 of the Act, namely to conduct bargaining and conclude a provincial agreement, it is to be noted that section 1(1) (n) contains no such restrictions but rather simply provides that for the purpose of the Act a trade union includes a designated employee bargaining agency. Further, section 125(a) of the Act defines an affiliated bargaining agent to include an employee bargaining agency, thus recognizing that there may be instances where an employee bargaining agency also holds bargaining rights in its own name. Having regard to these considerations we accept the applicant's contention that a designated employee bargaining agency is a trade union for all purposes of the Act. Having said that, however, it should be noted that to be certified as a bargaining agent a designated employee bargaining agency must still meet the statutory membership requirements provided for in the Act. Where the employee bargaining agency is itself a single provincial, national or international trade union it will usually be capable of taking employees either directly into membership.

or into membership by way of one of its locals, membership in a local union being regarded as membership in the local's parent trade union. Where a designated employee bargaining agency is in fact a council of trade unions, then membership in any constituent member union of the council will be deemed, because of the effect of section 9(3) of the Act, to be membership in the council itself. It is possible, however, that in certain instances a designated employee bargaining agency may find itself unable to have any individual employees as members, and accordingly be unable to meet the membership requirements to be certified as a bargaining agent.

9. Although we accept the proposition that a designated employee bargaining agency is a trade union for all purposes of the Act, we are not satisfied that the applicant in this case is in fact the designated employee bargaining agency. In the instant case the Minister designated not just the IBEW Construction Council of Ontario as the employee bargaining agency, but rather the Council along with the International Brotherhood of Electrical Workers. In other words, the designated employee bargaining agency is comprised jointly of the International Brotherhood of Electrical Workers, and the IBEW Construction Council of Ontario. Since this application was brought only by the IBEW Construction Council, it is apparent that the designated employee bargaining agency is not before the Board as the applicant for certification. Therefore the Board cannot conclude that the applicant is a trade union on the basis of its claim to be a designated employee bargaining agency.

10. As already alluded to, the Act sets out a mechanism by which councils of trade unions can be certified in their own right. Once such a council is certified the effect of section 1(1) (n) is to give the council the status of a trade union under the Act. Before a council can be certified, however, it must demonstrate to the Board that it is in fact a council of trade unions and that each of its constituent unions have vested appropriate authority in the council to enable it to discharge the responsibilities of a bargaining agent. The applicant in this case, however, declined to lead the evidence required to establish itself as a certifiable council of trade unions.

11. As a final note, section 1(1) (n) of the Act defines a trade union to include a certified employee bargaining agency. Although this point was not dealt with at the hearing, we are satisfied that this logically refers to the certification by the Board (as opposed to the designation by the Minister) of an employee bargaining agency to represent in bargaining a provincial unit of affiliated bargaining agents under section 128 of the Act and does not refer to the certification of a union as the bargaining agent for a unit of employees of a specific employer.

12. The applicant having failed to establish either that it is a trade union within the meaning of the Act or that it is a certifiable council of trade unions which once certified would come within the definition of a trade union, this application is hereby dismissed.

1546-77-M Christian Labour Association of Canada, (Applicant), v. Medi Park Lodges Inc. carrying on business as **Crescent Park Lodge**, (Respondent).

Employee – Reference – Whether particular R.N.A.'s exercise managerial functions

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *E. J. Forster, Fred Heerema and Peter Van Duyvenvoorde for the applicant; L. Bertuzzi for the respondent.*

DECISION OF THE BOARD; November 9, 1978

1. This is an application under section 95(2) of The Labour Relations Act to determine whether Jean Conway, Carol Vincent, and Judy Hall, Registered Nursing Assistants are employees of the respondent for the purposes of The Labour Relations Act. The Board authorized a Labour Relations Officer to meet with the parties and enquire into the duties and responsibilities of the three persons whose status is in dispute. His report was released on July 4, 1978 and the Board heard oral representations from the parties with respect to the report on August 10, 1978.
2. The respondent owns and operates a nursing home in Southern Ontario. The home operates on a three shift basis. The respondent in its operation employs an Administrator, a Director of Nursing who is an R.N., R.N.A's, Nurses Aides, and additional support staff. From the evidence in the Officer's report, it would appear that the Administrator and Director of Nursing work from early morning to approximately 4.30 p.m. daily and that all other times the most senior employee in the home is one of the three R.N.A.'s whose status is in dispute.
3. The evening shift is scheduled from 3.00 p.m. – 11.00 p.m. After 4.30 p.m., the shift is staffed by an R.N.A., four aides, and a cook who leaves at approximately 8.00 p.m. On the night shift scheduled from 11.00 p.m. – 7.00 a.m. are an R.N.A., three aides, and a cook who comes in to work at 6.00 a.m. The employer takes the position that the R.N.A's who work the evening and night shifts exercise managerial functions and are, by virtue of section 1(3) (b) of The Labour Relations Act, not employees for the purposes of the Act.
4. The R.N.A's on both shifts spend a substantial percentage of their time, six and one-half out of eight hours, performing professional nursing functions which in all respects with a single exception; i.e. the preparation and administration of medications are identical to those performed by the nursing aides. The remaining time is spent preparing patient reports which are then given to the staff of the oncoming shift. The R.N.A's have no authority to hire, fire, or suspend, and only limited authority to discipline employees having been authorized by the respondent to reprimand employees disobeying instructions and to take off the floor employees found injuring patients. Neither of the R.N.A's examined had ever been called upon to use this authority. They do not report to management on a regular basis on the quality of the work of other employees on the shift. Occasionally they are asked for opinions on work quality but there is no evidence that their opinions carry any particular weight. They have limited authority over work assignments, no authority over the scheduling of work, and no authority to grant time off.
5. Because they are the most senior persons on duty on both shifts, they have responsibilities in regard to certain operations necessary to running of the home. These responsibilities include ensuring snow removal, contacting the families of patients who

suddenly become seriously ill, contacting the maintenance man in the event that maintenance problems should arise, and contacting replacement personnel in the event that an employee is unable to make it in to work. In the performance of each of these responsibilities, they telephone a predetermined number. If they cannot reach the required person they call the administrator.

6. Successful collective bargaining is dependent in part upon the establishment and maintenance of an arm's length relationship between the employer and the trade union. Section 1(3) (b) is designed to promote that objective by avoiding situations where a person's job functions potentially or actually conflict with his or her loyalties to one or another of the two parties to the collective bargaining relationship. In excluding from the bargaining unit persons who exercise managerial functions, the Board has developed two tests. The effective recommendation test excludes those persons who in the performance of their job duties exercise a power of effective recommendation over the terms and conditions of employment of the employer's employees. The independent decision-making authority test excludes those persons who in the performance of their job duties possess an independent decision-making authority with respect to employer policy or the overall running of the employer's business. (*Inglis Ltd.* OLRB [1976] Rep. June 270).

7. The R.N.A's have only limited authority over the terms and conditions of employment of the other employees on their shifts. They have no general power to hire, fire or otherwise discipline employees. They have no general authority to even recommend in respect of these matters. There is nothing in the evidence contained in the Labour Relations Officer's report to warrant a finding as was urged by the respondent, that the R.N.A's should be regarded as exercising duties and responsibilities analogous to those exercised by "front line supervisors".

8. While the R.N.A's do perform certain duties necessary to the running of the respondent's business, the Board finds that in the performance of these duties, they do not exercise an independent decision-making authority. What decision-making authority the R.N.A's do possess in this regard is severely circumscribed.

9. It would seem to follow that the R.N.A's are employees for purposes of The Labour Relations Act.

10. At the hearing, the respondent informed the Board that its Crescent Park operation was one of three nursing homes which it operates in the Niagara region, and that in a previous Board decision involving one of these homes, *Service Employees Union, Local 204 and Oakwood Park Lodge* (unreported) File No. 1643-77-R, the Board found that three R.N's, who the respondent argued perform the same job functions as those performed by the three R.N.A's in its Crescent Park home, exercise managerial functions. The respondent contended that the only distinction between both groups of employees is their professional qualifications, a distinction which it says is without significance.

11. The Board agrees that the different professional qualifications possessed by the two groups is of no significance. However, it is unable to agree with the respondent's contention that the R.N.A's employed in its Crescent Park operation perform the same job functions as those performed by the three R.N's in its Oakwood Park operation. On the contrary, The Board finds substantial and significant differences.

12. The officer's report in respect of the above-noted matter disclosed that the R.N.'s employed in the respondent's Oakwood Park operation direct, assign and supervise the work of the R.N.A's, and nurses' aides. The R.N.'s are involved in the assignment of probationary employees. They are required to make an oral report to the Director of Nursing as to whether in their opinion a new employee should be retained at the completion of the probationary period. They can recommend that an employee be discharged. They report on an informal basis on the performance quality of permanent employees. They have authority to grant employees limited time off work. If an employee fails to punch in or out, they initial the employee's card verifying the employee's attendance. They are intricately involved in the training of new employees. In sum, the R.N.'s in the respondent's Oakwood Park operation exercise functions which have a far greater effect on the terms and conditions of employment of other employees of the respondent than those exercised by the R.N.A's in its Crescent Park operation.

13. The Board finds that Jean Conway, Carol Vincent and Judy Hall are employees of the respondent for purposes of The Labour Relations Act.

1031-78-R Service Employees International Union, affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant), v. **Elm Tree Nursing Home**, (Respondent).

Certification – Timeliness – Trade Union

Application brought by parent international union after local union's application dismissed – No bar restricting application by other trade unions imposed after earlier application – Subsequent application held timely

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *J. Sack and Joe Aggimenti for the applicant; Donald F. O. Hersey and Oscar Bazan for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES; November 10, 1978

1. This is an application for certification.

2. The respondent raises by way of preliminary objection that an application for certification had been made on November 21, 1977 by Local 204 and which application was dismissed on July 11, 1978 following a vote and at the time of dismissal the Board imposed a bar to any further application being made by Local 204 within a six-month period. It is the respondent's contention that the applicant in this present case is the same party as previously applied and, therefore, caught by the bar imposed by the Board. The applicant's position is that Local 204 and the International are separate entities each recognized in their own right as a trade union for the purposes of the Act, and that the Board's order ran against Local 204 and not against the present applicant.

3. The respondent called as a witness under subpoena, Mr. J. Aggimenti, who has been employed by Local 204 since January, 1977 as an Organizing Supervisor. Aggimenti testified that he was paid by Local 204 and had acted as organizer in the earlier application and that he was similarly involved in the current application. He testified to attending a meeting of some employees of the respondent in early September, in response to their telephone request and at the meeting the employees expressed a desire to again organize. Aggimenti states he refused their request for application for membership cards because he knew Local 204 could not then re-apply but asked for the matter to be left with him for a couple days and he would talk to his boss, Mr. Albert Hearn, International Vice-President and also President of Local 204.

4. Aggimenti met with Hearn on September 5, 1978 and asked if there was anything Hearn could do. Hearn replied in the affirmative and told Aggimenti that he wanted him to act on behalf of the International Union and supplied him with application cards different from those used by Local 204 in that no Local number appears thereon. Aggimenti thereupon met with his employee contacts, supplied them with these cards and an instruction sheet as to organizing procedure which instructions were on the International letterhead and signed by Hearn as International Vice-President and bearing no reference to Local 204. Aggimenti states that he told the employees on September 3rd that they could not organize into Local 204, that all evidence before the Board, both application cards and documentary evidence of money payment was fresh, and that employees were aware they were joining the International. The application to the Board was signed by Hearn as International Vice-President and the Form 8 Declaration similarly signed. Aggimenti when asked in re-direct as to whether employees were told they would be put into Local 204 after certification replied, "I couldn't say that. I told them they were going to get into the International. Those were my words."

5. Aggimenti testified that there are two Vice-Presidents of the International in Canada, one of whom is Hearn: that there are five International Representatives of which three are in Ontario: that one International Representative is also a Vice-President of Local 204, and another is also Business Agent of Local 204: that all officers are paid by the International even though they might assist and do work for Local 204 or other locals: that the International and Local bank accounts are separate. It was further stated that Aggimenti had two organizers working for him and that the International paid up to 50% of their salaries and that there were three Researchers of the International, one of whom worked in Local 204 office and did work for both organizations, and that Local 204 offices were on the same floor in the same building as the International.

6. The Board's jurisprudence over a very lengthy period of time has treated a parent International Union as a separate and distinct entity and each Local Union of such International as an entity, separate and distinct from other Locals as well as from the International. (See, *International Brotherhood of Electrical Workers and Hydro Electric Commission of Hamilton* 58 CLLC ¶18,120; also *Hydro-Electric Power Commission of Ontario* [1966] OLRB Rep. Nov. 596; also *Swingline of Canada Ltd.* [1971] OLRB Rep. Nov. 710). This separate entity concept has been applied by the Board for a number of purposes under the Act.

7. The respondent argues that the present case is distinguishable from those cited in that the Constitutions of the applicant and of Local 204, read together, justify a conclusion that Local 204 does not have the capacity to act independently of the applicant in respect to

the fundamental obligations of a trade union under The Labour Relations Act in respect to executing a collective agreement or in calling a strike, and that these powers are vested in the applicant so that in truth there is only one entity.

8. Our reading of the Constitution of Local 204 does not support the respondent's contentions relative to its capacity to enter into collective agreements in its own right or to call a strike of its members.

9. While Local 204 in its inception is the creature of the International its Constitution expressly provides that it "cannot be dissolved while there are seven (7) dissenting members". Article XVIII(2) provides "The title to all property, funds and other assets of this Local Union shall at all times be vested on the Local Executive Board...": there are provisions for election of officers and an eligibility requirement that only persons who have been members of the Local for two years are eligible, and a procedure provided for the amendment of the Constitution. It is the general structure of a viable, independent organization and this is not detracted from by virtue of the fact that the members have agreed amongst themselves in their Constitution to subordinate their Constitution to the International's in event of any conflict or in certain other actions such as that raised by the respondent in respect of the right to strike.

10. The Local Constitution in Article XIX(1) provides no strike will be called in a bargaining unit except by vote of the employees through secret ballot. Article XIX(3) provides that no strike will be called without previous notification to the International President who has the power of veto. In our view this latter provision does not go to the Local's capacity to call a strike but it is a recognition that the Local's objectives must be harmonized with the International's.

11. The Local Constitution does not make any specific reference to its power to negotiate collective agreements. It is obvious from Article XI, Section 2 of the Local Constitution specifying that collective agreements shall be signed by a Business Agent, together with a committee of employees affected after having first been reported to the Local's Executive Board, that the power to contract is implied. The International Constitution, also, Article XIII(11) specifically contemplates such actions by Locals as follows, "The International Union shall be notified in writing when any collective bargaining negotiations or memorandums of understanding have been concluded..." and we do not find any derogation from this Local Union capacity by virtue of the fact that the International President is empowered to negotiate and enter into area-wide, company-wide or multi-employer agreements "in consultation with the Local Unions involved."

12. In summary we see no distinction to be drawn in the relationship of Local 204 and this International, than what generally obtains between Locals and their parent. It is our finding that there is no demonstrated lack of capacity in either the applicant, or Local 204, to independently fulfill the obligations of a trade union under The Labour Relations Act which would justify a conclusion that for these purposes they are the same entity

13. The respondent also takes the position that the fact that both the organization campaign for Local 204 and that of the International were implemented by the same individual, Aggimenti, is sufficient to justify the inference that what we have is a single entity despite the apparent existence of two organizations. In our view this argument is not well-

founded. Once we have concluded, as we have, that for the purposes of this Act Local 204 and the International are to be treated as separate entities, each with status as trade unions under the Act, the choice of the agent through which either entity acts becomes irrelevant to the entity's status. In this regard, perhaps the best analogy is that from the corporate field where the separateness of status of a wholly owned subsidiary and its parent remain unimpaired in the face of the Chief Executive Officer's responsibilities of each entity being vested in one and the same person.

14. We therefore find that the applicant is not the same entity as Local 204 and, therefore, the bar to entertaining an application for certification imposed by the Board in its July 11, 1978 decision is not effective against the applicant.

15. The respondent makes the further argument that the current application is colourable and a deliberate attempt to avoid the Board's order of July 11, 1978, and relies on the Board's decision in the case of *The Sisters of St. Joseph of the Diocese of London* [1972] OLRB. Oct. 846. In that case *The Nurses Association of St. Joseph's Hospital, London, Ontario*, certified in 1968, had entered into collective agreements with the employer and in negotiating a renewal of its latest agreement went on to arbitration as provided by the legislation. In the words of the Board dealing with that case, "...it appears that the results of the arbitration...were not satisfactory...to the Association...The membership of the Association decided to disband and form another trade union in anticipation that a subsequent certification would allow them to start afresh..." The Board there found that the newly formed trade union, *The Association of Nurses St. Joseph's Hospital, London Ontario* was in effect the same organization as *The Nurses Association of St. Joseph's Hospital, London Ontario* and refused to entertain the application.

16. We agree with the Board's finding in that case, that the nature and purpose of the application which was to avoid the general duties and obligations imposed by the legislation, was a critical factor to be considered in determining whether a separate and distinct new entity had been brought into existence.

17. In the instant case the evidence is that the applicant has been in existence for some period prior to 1944 (at which time it issued a charter to Local 204) and has enjoyed a separate and distinct existence from Local 204 for the purposes of this Act through that time period. It certainly cannot be said that the nature and purpose of bringing the International into existence was in any way related to the instant application. We are not prepared to find that the long existing separateness of identity is affected by the bringing of this application. There is no evidence that the applicant sought to misrepresent the separateness of itself and of Local 204 and indeed, the evidence is that the applicant took pains to ensure that all should know that it was acting on its own behalf. We adopt the language of the Board in the *Pinehill Auto Ltd.* case [1968] OLRB Rep. July 375, paragraph 4 in which it said,

"The Board has always treated an International or national trade union as a separate and distinct entity apart from its locals and has also treated each local of a trade union as a separate and distinct entity. Accordingly, when a local of a trade union makes an application for certification for a unit of employees that another local of the same trade union has just previously sought certification, the new applicant is in no different position than if the application had been made by an entirely

different trade union or one of its locals. We would point out that in *The Hydro Electric Commission of Hamilton* case, where an International union applied for certification shortly after an application by one of its locals had been dismissed, the Board only directed the taking of a representation vote because of the peculiar circumstances relating to the evidence of membership which do not exist in the instant case."

18. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

19. The Board determines that all employees of Elm Tree Nursing Home in Metropolitan Toronto, Ontario, save and except professional medical staff, registered nurses, graduate nurses and undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. The Board is satisfied on the basis of all the evidence before it that more than fifty five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 22, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. The applicant challenged the omission from the lists of employees supplied by the respondent of the names of Louis Barrett, Marjorie Blair, Lyndalou Cudamin, Patricia Mason, Teresita Pangilinan, Syntra Persad, and Merva Williamson, all of whom are classified by the respondent as supervisors. Miss J. Grimwood, Labour Relations Officer, is hereby appointed to enquire into and report thereon to the Board on the duties and responsibilities of the aforementioned employees.

22. The Board is further satisfied that, irrespective of the ultimate determination to be made as to the status of these persons in dispute, it cannot affect the applicant's right to certification and the Board therefore directs interim certification of the applicant pending the final resolution of the dispute.

DECISION OF BOARD MEMBER J. D. BELL:

1. I agree with the majority of the Board that for purposes of The Labour Relations Act, Local 204 and the International are to be treated as separate entities and each has status as a trade union.

2. I must also agree that the bar to entertaining an application for certification by Local 204 which was imposed by the Board in its decision of July 11, 1978 does not apply to the applicant International.

3. The fact that the organizer for Local 204 and for the International was the same individual, Aggimenti, cannot be ignored. We assume that the applicant International, hav-

ing ensured all concerned that it was acting on its own behalf and not for Local 204, will continue to do so and the bargaining rights which flow from this decision will not be transferred to Local 204 which was barred by the decision of July 11, 1978.

0998-77-R Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **Giordano Sand & Gravel Limited**, (Respondent).

Employee – Whether owner – operators of vehicles are dependent contractors

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *Bruno A. Teichmann, Philip J. Wolfenden and Gerald Wilkes for the applicant; S. C. Bernardo, R. Winslow and George Petta for the respondent.*

DECISION OF THE BOARD; November 8, 1978

1. The applicant has applied for certification with respect to a group of dump truck operators. The respondent is a producer of sand and aggregates at its pit in Claremont. The Board has considered the report of the Labour Relations Officer and the representations of the parties.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.
3. The applicant adopted the position that the persons for whom it seeks bargaining rights are: Shane Harper, James Smith, Sandy Nicolai, Harvey Pearson, Fernando De Persis and Michael Harper. The applicant maintained that these six persons are dependent contractors within the meaning of section 1(1) (ga) of The Labour Relations Act and are therefore employees under the Act by virtue of section 1(1) (gb). The applicant also maintained that six other persons, namely, Gary Anchor, Kenneth Strickland, Murray Neill, Ken Yates, Tom Wells and Merle Timbers are neither dependent contractors nor employees within the meaning of or under The Labour Relations Act.
4. The respondent adopted the position that all eleven persons are independent contractors and fall outside the provisions of The Labour Relations Act. The respondent also argued that if the first six persons are dependent contractors then the other six persons are also dependent contractors.
5. The Board will initially consider the status of Shane Harper, James Smith, Sandy Nicolai, Harvey Pearson, Fernando De Persis and Michael Harper and then consider the status of the other persons referred to in paragraph three.

6. On the date of the filing of this application these six truckers had been associated in their work with the respondent for periods between four month and twelve years. The average length of association being about four-and-a-half years. None of them has signed an agreement with the respondent with respect to the work they perform for the respondent.

7. These six truckers for the most part commenced their association with the respondent by responding to a call from the dispatcher. Some of them characterized their initial association as part-time. This part-time association evolved into steady or regular work with the respondent.

8. In the area of the work day routine, during busy periods the respondent's pit opens at approximately 6:00 a.m. The work day during such periods ends between 4:30 and 5:00 p.m. These six truckers are regarded as the regular truckers, are told to report to the pit early and operate on the basis that the first one in is the first one to be loaded. If a trucker reports to the pit late he is told to report on time "or else". These truckers are given instructions regarding where to go with their load and are given an order form which contains the name of the customer and the destination of the order. The truckers only rarely deliver cash on delivery orders and do not accept cheques from customers.

9. In the area of control, at least two of the truckers indicated that the respondent gave active support in obtaining their PCV licences. If a trucker is sick or is experiencing mechanical difficulties he is expected to telephone the respondent and state his reason for not coming in or coming in late. On occasions when the respondent is busy, the dispatcher has telephoned a trucker to find out why he was not present at the pit. When it is raining the dispatcher will telephone the truckers and tell them if there is work. The respondent keeps attendance records on the truckers. The truckers are not aware of whether a customer has or has not paid the respondent and are paid by the respondent independently of whether a particular customer has paid for material and its delivery from the respondent's pit. If a load has to be brought back the trucker is paid for both trips. The truckers are seldom able to refuse a load and where they have been successful it has been due to the conditions at the site where delivery is required. When work is slow at the respondent's pit, the respondent has found work for the truckers at other places. While the truckers may ask the respondent if they can go to another place to work, the respondent has first call on their services. In fact, while some of the truckers participate in snow removal, the respondent is made aware that they are going and still has first call on their services. The truckers generally consult with the dispatcher about taking their vacations. Next to the dispatcher a list of these truckers is posted. Some of the truckers regard this list as a seniority list. Truckers are not put on the list during their initial association with the respondent. A Trucker's position on the list determines when he is going to be called in when work diminishes in volume. A trucker may be removed from the list for poor performance. Although a trucker may briefly work with someone other than the respondent, he may maintain his position on the list by returning. One of the drivers gave evidence that names are removed from the list when a trucker is "fired".

10. The truckers received cheques from the respondent in payment for their services every two weeks. One week's pay is held back. If there are any problems the truckers consult the respondent's paymaster. The rate of pay is sixteen dollars per hour. If a customer signs for waiting time a trucker is paid for this time if it is more than fifteen minutes. The only deductions from their cheques from the respondent are with respect to gasoline and

materials which they may purchase from the respondent. For the past two years the truckers have met with the respondent's salesman in the Spring to discuss rates of pay and jobs. The salesman usually presents the rates for the coming year and the representative of the truckers tells the salesman whether the drivers accept the rates. The representative usually tells the salesman what the truckers want as the rates. However, the truckers do not always obtain the rates they have requested from the respondent.

11. The truckers own their trucks and have financed the purchase of their trucks without the respondent's assistance. The truckers each own one truck. Only Sandy Nicolai has owned more than one truck in the past. On the date of the filing of this application Mr. Nicolai owned one truck.

12. The respondent requires a certain level of insurance. There are no markings on the trucks other than the name of the trucker and/or his telephone number. The truckers do their own repairs. The only exceptions to this occurred when the respondent did some welding without charge on Fernando De Persis' truck and also did some minor repairs without charge on Michael Harper's truck. The truckers drive their own trucks. However, James Smith has a problem which requires attendance at the Workmen's Compensation Board. On these occasions he uses another man to drive his truck.

13. In the area of discipline, the respondent has threatened to send truckers out of the pit or "fire" them. Truckers have been told by the respondent to be at the pit on time or they would not be working there. There is evidence in the Report that Shane Harper was "fired" because the respondent's salesman did not like his attitude about rates. Mr. Harper was initially dismissed but the incident was subsequently settled.

14. The truckers are subject to the respondent's rules in the pit with respect to dumping, loading and overloading, speed limits and the wearing of hard hats outside the trucks.

15. Generally speaking, the truckers do not solicit business for the respondent. Mr. Nicolai has had his own invoices printed up as a prelude to going into the gravel pit business himself before he changed his mind. Five of the six truckers do no advertising at all. Shane Harper has an unlisted telephone number. Mr. Smith had business cards printed and still has them.

16. In the area of sources of income or economic dependence, Mr. De Persis has not worked steadily for anyone other than the respondent since 1969. For three months prior to the date of the filing of this application, he did work only for the respondent. He has no source of income other than through his truck and in 1975 and 1976 he worked solely for the respondent. Shane Harper started working with the respondent in 1976 and has not solicited any work since that time. During this period of time his only other income has been about two thousand dollars in 1976 from hauling snow. Mr. Pearson had been working with the respondent for only four months when this application was filed. During that time he has earned about ninety-nine per cent of his income from working with the respondent. He had previously worked with the respondent and had been "laid off". Mr. Nicolai has worked only with the respondent except for the odd day if things were slow at the pit. While he had purchased small amounts of materials from the respondent, this has been done only for relatives. Mr. Smith during the period of 1975 to 1977, with the exception of a few days work at two other pits, has worked nowhere else except for snow removal. When business is slow the respondent tries to arrange work for the truckers at other pits.

17. The other six persons were not working with the respondent on the date of the filing of this application. However, all of them had worked with the respondent within the one month period prior to the date of the making of this application and five of the six also worked with the respondent within one month subsequent to the date of the making of this application. Five of these six persons would be included for the purpose of the count if they are determined to be dependent contractors within the meaning of section 1(1) (ga). For a discussion of the considerations in the application of the thirty-day rule to the persons affected by this application see the *Dufferin Aggregates* case, [1978] OLRB Rep. March, pp. 278, 283-4. It is therefore necessary for the Board to consider their status. All of these persons earn considerably less than half of their income from working with the respondent. None of them is on the list of truckers who regularly and normally work with the respondent. For the most part, they appear to have commenced to work with the respondent within the last year or two. They do not regularly report to the dispatcher. They do contact the dispatcher to see if their services are required and would see if any work was available before lining up. The respondent clearly does not have priority on their services and they work with a far greater variety of operations of pits and facilities. One of these persons is clearly an employer in his own right. All of them solicit business from a variety of sources.

18. Under section 1(1) (ga) a person need not be employed under a contract of employment in order to be a dependent contractor. In addition, the fact that the six truckers furnish their own vehicles is no longer determinative of their status. The emphasis in section 1(1) (ga) is placed upon a person performing work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon and under an obligation to perform duties for such a person more closely resembling the relationship of an employee than that of an independent contractor. In order for a person to be determined to be a dependent contractor within the meaning of section 1(1) (ga) such a person must not only be in a position of economic dependence but must also be under an obligation to perform duties more closely resembling the relationship of an employee than that of an independent contractor.

19. The six truckers own their vehicles and bear the responsibility for maintaining them. However, each of them receives all or the majority of his income from the respondent. They are on a list of truckers who regularly work with the respondent. With the exception of snow removal the six truckers either work with the respondent or work at pits where the respondent has succeeded in finding work for them. The snow removal presents a minimum of inconvenience to the respondent and its efforts to find additional work for the six truckers helps to foster their ongoing relationship. Even when any of the truckers engages in snow removal the respondent is notified beforehand and it is clear that the respondent still has first call on their services. The snow removal is not a factor which removes these six truckers from economic dependence on the respondent. The absence of entrepreneurial or business initiative by the six truckers underlines their economic dependence on the respondent. There is no attempt to solicit business and to extend their business horizons beyond the respondent and the snow removal. Their work either flows through the respondent or is undertaken with the permission of the respondent.

20. The obligation to perform services for the respondent more closely resembles the relationship of an employee than that of an independent contractor. The six truckers are required to inform the respondent when they are unable to attend at the pit for work and to state the reason for their absence. Where this is not done the dispatcher contacts the trucker

and determines the reason for absence or delay. The respondent maintains an attendance record. The truckers are for all practical purposes unable to refuse a load and generally consult with the dispatcher about vacations. The truckers perception of their relationship with the respondent contains references which are more appropriate to an employer-employee relationship than to that of an independent contractor. For example, if a trucker reports to the pit late he is told to report on time "or else". Another example is the removal of the name of a trucker from the list when he is "fired" and the dismissal of a trucker because the respondent's salesman did not like his attitude about the rates. There is nothing in the evidence before the Board which indicates that this perception is in any way distorted.

21. The truckers are paid on a ton-mile basis. They receive payment every two weeks based upon their work regardless of whether the respondent collects from the customers. While a form of collective representation appears to be developing between the truckers on the one hand and the respondent on the other, the rate for the job is effectively set by the respondent.

22. The Board finds that the six truckers are in a position of economic dependence upon, and under an obligation to perform duties for, the respondent more closely resembling the relationship of an employee than an independent contractor. These persons are dependent contractors within the meaning of section 1(1) (ga) and are accordingly, by virtue of section 1(1) (gb), employees under The Labour Relations Act.

23. James Smith on occasion uses another person to drive his truck when he attends at the Workmen's Compensation Board. There is nothing before the Board which indicates that he had used another person to drive his truck on the date of the making of this application. Even if Mr. Smith had used another person to drive his truck on the date of the making of this application, it is doubtful whether such intermittent and infrequent use would cause the Board to change its determination as to the basic nature of the relationship. In this regard see the *Superior Sand, Gravel & Supplies Ltd.* case, [1978] OLRB Rep. February 119; the *Canada Crushed Stone* case [1977] OLRB Rep. December 806; and the *Flintkote Company of Canada Limited* case (Board File No. 1061-77-R, decision dated September 18, 1978) where the occasional use of temporary substitute as a driver did not affect the finding by the Board of the existence of the relationship of dependent contractor and employer.

24. The six other persons, namely, Gary Anchor, Kenneth Strickland, Murray Neill, Ken Yates, Tom Wells and Merle Timbers, work on an irregular basis for the respondent. While some of them may ultimately increase the amount of work they do for the respondent, none of them has yet moved into an orbit of economic dependence upon the respondent. These six persons have maintained a position of economic independence with respect to the respondent. The Board finds that the six persons referred to in this paragraph are not dependent contractors with respect to the respondent within the meaning of section 1(1) (ga) of The Labour Relations Act.

25. The Board further finds that all dependent contractors working at or out of the respondent's location at Brock Road, Claremont, save and except dispatchers and persons above the rank of dispatcher, constitute a unit of employees of the respondent appropriate for collective bargaining.

26. The Board is satisfied on the basis of all the evidence before it that more than

fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 3, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

27. A certificate will issue to the applicant.

0864-78-R Labourers' International Union of North America, Local 183, (Applicant), v. **Grove Drain Company Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Construction Industry – Employee status determined without regard to length of employee's service with employer

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *B. Fishbein and T. Connolly for the applicant; G. Grossman, Carlyle Acri and Guy Acri for the respondent; no one for the objectors.*

DECISION OF THE BOARD; November 16, 1978

1. The name: "Grove Drain Company" appearing in the style of cause of this application as the name of the respondent is amended to read: "Grove Drain Company Limited".
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.
3. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. At the hearing the Board disclosed the membership position of the applicant. The applicant filed evidence of membership on behalf of three of the five persons who were in the bargaining unit for the purpose of the count. The statement of desire which was filed in opposition to this application for certification was signed by the other two persons in the

bargaining unit. The Board announced that since there was no overlap between the three names on the evidence of membership and the two names on the statement of desire the applicant was in a position to be granted certification without any inquiry into the origination, preparation and circulation of the statement of desire.

6. At this point the respondent requested an opportunity to call John Civerio, one of the persons who had signed the statement of desire, to testify that he was not approached by the applicant and that Mr. Civerio and Luigi D'Avino, the two long-term employees of the respondent, did not want to be represented by the applicant. The respondent requested the Board to exercise its discretion under section 7(2) of The Labour Relations Act and direct a representation vote. The applicant opposed the request of the respondent.

7. After considering the representations of the parties, the Board ruled at the hearing that the respondent would not be permitted an opportunity to call Mr. Civerio as a witness and that the evidence which the respondent proposed to call was immaterial to this application.

8. The respondent, in our view, was attempting to demonstrate that its two long-term employees did not want to be represented by the applicant and that the other three recent or temporary employees' wishes in the matter have to be weighed against the views of the two long-term employees. The Board will assume for the purpose of argument that this was in fact the situation among the respondent's employees.

9. The Labour Relations Act makes no distinction between the length of service of any employee who may be affected by an application for certification. In the construction industry the number of employees may vary widely during the course of an employer's involvement with a particular project. For this reason, in applications for certification under the construction industry provisions of the Act, the Board determines the number of employees in the bargaining unit at the time the application was made to be the number of employees on the date of the filing of the application. In our view, there is no basis under the Act for giving greater weight to the views of only forty per cent of the respondent's employees in a situation where sixty per cent of the respondent's employees have indicated their desire to be represented by the applicant. While it is no doubt desirable from the applicant's point of view to approach all employees of the respondent in order to secure their membership in the applicant, there is no requirement under the Act that the applicant approach all of the respondent's employees.

10. The respondent did not refer to any examples of applications for certification where the Board had permitted evidence to be called by an employer where a statement of desire, which was timely under the Board's Rules of Procedure, did not indicate a change in support for an applicant. The Board notes that the respondent has not filed any allegations of improper or irregular conduct against the applicant.

11. In our opinion, if the Board permitted the respondent to call such evidence, it would amount to the proposition that notwithstanding the degree of support enjoyed by a trade union an employer's perception of the views of some of its employees is to be considered by the Board in preference to the wishes of its employees as expressed by evidence of membership and signatures on a statement of desire in opposition to an application for certification.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 23, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The Board in the exercise of its discretion under section 7(2) of the Act finds no reason to direct the taking of a representation vote.

13. A certificate will issue to the applicant.

0905-78-M Graham Food Products Limited, trading as **Hickeson-Langs Supply Company**, (Employer), v. Teamsters Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, (Trade Unions).

Collective Agreement – Reference Whether document comprises one or two collective agreements – Whether failure to ratify by one local – Whether no agreement in whole or in part

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members H. J. F. Ade and Bruce K. Lee.

APPEARANCES: *Bruce Binning and Paul Nielsen for the employer; Ken Petryshen, Sean Floyd and E. H. Winegarden for the trade unions.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER H. J. F. ADE; November 7, 1978.

1. The minister has referred to the Board, pursuant to section 96 of The Labour Relations Act, the questions as to whether the Minister has authority under the Act to appoint a conciliation officer.

2. The employer objects to the request that conciliation be granted with respect to both of the local unions from whom it is sought on the grounds that a collective agreement between the employer and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141 is in existence. The union denies that such a collective agreement exists.

3. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 141 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "Local 141") was certified as bargaining agent for all employees of Graham Food Products Ltd., trading as E. W. Hickeson & Co. (London) (hereinafter called "the employer") at London, with certain exceptions not here relevant on June 17, 1968.

4. Warehousemen and Miscellaneous Drivers Local 419 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein-

after called "Local 419") was certified as bargaining agent for all employees of the employer (with certain irrelevant exceptions) at Metropolitan Toronto on June 12, 1968.

5. The company and the two local unions have conducted common negotiations which resulted in a collective agreement in 1971, 1974 and 1976, signed by representatives of the company and by representatives of each of the locals. The headings of the 1974 and 1976 agreements indicate that the parties thereto are the company on the one hand and Local 419 and Local 141 "collectively called the Union" on the other hand.

6. The collective agreement which was entered into in 1976 was effective until March 4, 1978.

7. By letter dated December 6, 1977, the Vice-President of Local 419, which is the Toronto Local, advised the company on the letterhead of Local 419 as follows:

Please be advised that the Union wishes to make amendments to the existing Collective Agreement which expires on March 4, 1978.

Our proposed revisions will be forwarded to you in due course, at which time we can set up a mutually convenient date on which to commence negotiations.

8. The Vice-President of Local 141 sent the following letter to the company on February 22, 1978:

Please be advised that we wish to amend the present agreement between your Company and this Local Union.

Would you kindly advise this office by return mail, on a date you would be available to meet.

Yours truly,
TEAMSTERS UNION
LOCAL 141,

"E. H. Winegarden"

E. H. Winegarden,

Vice-President.

These types of individual notices were employed with respect to notices to bargain used for negotiations for earlier agreements. That is, each local sent its own notice of desire to bargain. The Local 141 letter, it should be noted, refers to "the agreement between your Company and *this Local Union*". (The emphasis is added.)

9. The parties met in due course and a Memorandum of Agreement was signed on Monday, June 19, 1978. The relevant portions of the Memorandum are as follows:

The parties have agreed upon the document attached and entitled "MEMO-

RANDUM OF SETTLEMENT – 1978”, as forming the basis for settlement of all matters in dispute between them and each party agrees to recommend acceptance of the terms hereof to its respective principals. Upon ratification of this Memorandum of Agreement, it shall, together with the “Memorandum of Settlement – 1978”, form the Collective Agreement until the more formal document is executed. The Collective Agreement between the parties executed March 29, 1976, shall be renewed in all respects for a period commencing upon the date of ratification (unless otherwise specifically stated in the “Memorandum of Settlement – 1978”) and expiring March 8, 1980, save and except as amended by the terms of the “Memorandum of Settlement – 1978” attached hereto.

10. The Memorandum was accepted by the company and was ratified by the membership of Local 141. It was, however, rejected by the membership of Local 419. The company, upon being notified of this, took the position that it had made a collective agreement with Local 141.

11. The position taken by the Locals, however, is that the employees at London and the employees at Toronto form one bargaining unit since, as the fact is, that the majority in the combined groups rejected the Memorandum, no collective agreement exists. The request for conciliation services was then made by both Locals in accordance with that contention.

12. In support of its argument that there is only one composite bargaining unit, the union refers to the recognition clause in the collective agreement of March 29, 1976 which is incorporated into the agreement of June 19, 1978 set out above. The recognition clause states as follows:

The Company recognizes the Union as the exclusive Bargaining Agency with respect to all matters arising under this Agreement from all employees at Toronto and London, save and except foremen, persons above the rank of foreman, office staff, sales staff. Part-time and Casual employees and Students, shall be covered only as specifically set out in Appendix “B” to this Agreement.

13. The argument based upon the recognition clause runs into initial difficulty in view of the fact that there are here two distinct bargaining agents, one in London and the other in Toronto.

14. In the *Ontario Hydro* case, Board File No. 0362-78-R dated August 14, 1978, the bargaining rights were held by the International Union in two locations, as the result of which the members were grouped into separate locals which were found to be servicing locals for the International. In the collective agreement in that case the employer recognized the International as bargaining agent for “all employees at the Richard L. Hearn Generating Station at Toronto and the J. Clark Keith Generating Station at Windsor”. In that case the Board found that one document served as a separate collective agreement for each of the bargaining units involved. In the instant case not only is there no question of one union being the overall bargaining agent but, on the contrary, there are two distinct certified bargaining agents – one in London and the other in Toronto. There is nothing to suggest that

the locals comprised a council of trade unions under section 43 of the Act, nor was there any suggestion that individual bargaining rights had been transferred from one local to the other or by both to a third bargaining agent of any kind. The Memorandum of Agreement recognizes the separate identities of the locals not only in the heading but, more to the point, in the text. The separate identities as bargaining agents are further emphasized by the manner in which the signatures are affixed to the document.

15. The text of the Memorandum provides that “each party agrees to recommend acceptance... to its respective principals”. The heading and the provisions for signatures clearly lead to the conclusion that the locals are “parties” and that the “principals” are obviously the members of the individual locals for whom the bargaining committees of each local bargained and signed the Memorandum. Care is taken in the form in which the Memorandum provides for signatures to keep the Toronto and the London groups separate.

16. There are many clauses in the documents referred to in the Memorandum which make no reference to the existence of two units and which may be consistent with the existence of only one unit. There is, on the other hand, provisions for distinct seniority by branch and agreement that “letters of understanding to be binding shall be signed by the Steward Body of the Branch (Toronto or London) to which the understanding applies”. Both provisions lend support to the notion of two bargaining units.

17. On the basis of the Memorandum of Agreement the Board finds that the company and the bargaining committees of each local reached separate agreements on the provisions to be incorporated in new collective agreements, subject to ratification. The Agreement was ratified by Local 141 and by the company and the ratification was confirmed. The Agreement was not ratified by Local 419. There is, accordingly, a collective agreement between the company and Local 141. There is no collective agreement between the company and Local 419.

18. The question put by the Minister is with respect to his power to appoint a conciliation officer to deal with both locals and the company. The precise answer to the question as framed by the Minister, in view of the finding of the Board set out above, is “No”. However, in order to avoid further proceedings, the Board would point out that the Minister has power to appoint a conciliation officer with respect to the dispute between the company and Local 419.

19. Board member, Bruce K. Lee, dissents with reasons to follow.

0745-78-R International Brotherhood of Electrical Workers – Local 586 – Ottawa, (Applicant), v. **Lyle West Electric Limited**, (Respondent).

Certification – Construction Industry – Bargaining Unit Board refusing to define bargaining

nights by reference to sectors – Discussion of background and intent of province wide bargaining scheme

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Thomas K. Moffatt for the applicant; R. A. Werry for the respondent.*

DECISION OF THE BOARD; November 8, 1978

1. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.
2. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
3. The applicant has applied for certification with respect to a regular craft unit of electricians and electricians' apprentices in the Regional Municipality of Ottawa-Carleton. The respondent has described the appropriate bargaining unit in terms of electricians and electricians' apprentices in the Regional Municipality of Ottawa Carleton engaged in residential construction save and except non-working foremen and persons above the rank of non-working foreman.
4. At the commencement of the hearing it was agreed that the appropriate bargaining unit ought to be defined with reference to the Board's geographic area # 15, that is to say, the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell. It was also agreed that non-working foremen and persons above the rank of non-working foreman ought to be excluded from the appropriate bargaining unit. The parties were apart only with respect to the question of restricting the bargaining unit in terms of "engaged in residential construction". The job which forms the basis of this application involves work in the residential sector of the construction industry.
5. The respondent based its argument for the determination of the appropriate bargaining unit in terms of "engaged in residential construction" on the history of collective bargaining in the Ottawa area with respect to electricians and electricians' apprentices. It was agreed that the same rates of pay and similar conditions of employment had applied with respect to electricians and electricians' apprentices in the residential sector and the industrial commercial and institutional sector in the Ottawa area for fifty years. The respondent, however, wished to be insulated from the effects of province-wide bargaining in the industrial, commercial and institutional sector. It was conceded by the respondent that there was nothing in The Labour Relations Act which requires the Board to certify a trade union with reference to a sector or sectors. The respondent did not explain how, in the circumstances of collective bargaining in the Ottawa area, the determination of the appropriate bargaining unit with reference only to "engaged in residential construction" would insulate it from the effects of province-wide bargaining in the industrial, commercial and institutional sector.
6. The applicant argued that the appropriate bargaining unit should not be defined with reference to a sector or sectors and that the Board should continue its practice of defining bargaining units in the construction industry without reference to sectors.

7. Prior to the enactment of *The Labour Relations Amendment Act, 1961-62*, S.O. 1961-1962, c.68, the Board generally determined that craft units were appropriate for collective bargaining in applications for certification which involved craft trade unions in the building trades with respect to construction work. Such appropriate bargaining units by analogy with appropriate bargaining units in industrial enterprises were either restricted to a particular project, see, for example, the *Sir Lindsay Parkinson (Canada) Limited* case, [1955] OLRB Rep. Jan. 12, the *Canadian Engineering and Contracting Co. Limited* case, [1957] OLRB Rep. July 27, the *Tellier & Grouleau General Contractors* case, [1960] OLRB Rep. Aug. 175, and the *Frid Construction Company Limited* case, [1962] OLRB Rep. Jan. 333; or defined with references to employment at or working out of a particular municipality, see, for example, the *B. G. Thiesen Construction Co. Ltd.* case, [1955] OLRB Rep. Oct. 10, the *Smith & Elston Company Limited* case, [1957] OLRB Rep. July 20, the *Milbern Window Limited* case, [1960] OLRB Rep. July 142, and the *L. G. Byrd & Son* case [1962] OLRB Rep. March 410; or defined with reference to a particular municipality, see, for example, the *Hamblin Electric* case, [1955] OLRB Rep. Jan. 11, the "*El Mech*" *Tools Ltd.* case, [1957] OLRB Rep. Sept. 23, the *Hill-Clark-Francis Limited* case, [1960] OLRB Rep. July 146, and the *M. J. Sulpher & Sons Ltd.* case, [1962] OLRB Rep. March 412.

8. Following strikes in the construction industry in and around Metropolitan Toronto during 1960 and 1961, H. Carl Goldenberg, Q.C., was appointed a Commissioner in June of 1961 to inquire into and report upon the relations between labour and management in the construction industry in Ontario. This report which is entitled the *Report of The Royal Commission on Labour-Management Relations in the Construction Industry* was released in March of 1962. The Report considered certification and bargaining units in relation to the construction industry and stated at page 27-28:

Bargaining rights in Ontario may be established by certification under the Labour Relations Act or by voluntary agreement between employers and trade unions. These alternatives should continue to be available. In the construction industry voluntary recognition is the general rule. This is attributable in larger part to the history of collective bargaining in the industry which long ante-dates labour relations legislation. In part it is also due to the fact that the certification procedure as it stands is not generally appropriate to the industry.

The bargaining unit envisaged by the Act is a group of regularly employed persons engaged by a single employer and working at a particular location throughout the year. Construction employment does not fit this picture. It has no stability. The worker moves from job to job and from employer to employer. The duration of his employment may range from a few days to a number of months, depending upon the size of the project. The class of craftsmen and the number employed in any particular craft will rise and fall as the job progresses. There is rarely any period of time during which the number of employees in some of the crafts on a construction project can be said to constitute a "normal work force", in the sense in which that term is used in manufacturing.

Although the workers, moving from one employer to another, may on the facts look to the group of employers rather than to the employer on any par-

ticular project as the employing unit, certification under the Labour Relations Act appears to envisage a single-employer, single-location unit. In the construction industry this means certification for the particular project. However, the nature of construction employment being as described, project certification proceedings may prove futile because the time consumed in processing the application may be equal to or even exceed the duration of the phase of construction affected by the application. A number of cases in which this has occurred were cited in briefs to the Commission.

The Labour Relations Board faced the problem of certification in the building trades early in its history. In the *Frontenac Construction Case*, (1946) D.L.S. 7-1277, recognizing that its decision might well establish that certification for collective bargaining purposes is inapplicable to most phases of the building construction industry, the Board nevertheless held that a unit of building construction employees temporarily employed for an indefinite period of time was not a unit appropriate for collective bargaining. This policy was changed in the *Sinclair Cut Stone Case*, (1950) D.L.S. 7-2123, where the Board declared that it would certify unions for units of construction employees notwithstanding the nature of the tenure of employment. In the course of its decision, the Board said:

...the question whether certification will, in a particular case, be of benefit to the employees affected or will pose difficult problems for the parties concerned is not one for the consideration of the Board. An applicant which meets the necessary requirements is entitled to certification for what it is worth. It is not the intention of the Board to endeavour to estimate the probable future value of certification.

9. The Commissioner expressed concern with the Board's procedures and delays and stated at page 32:

For effective use of the certification procedure in the construction industry it is essential that applications for certification be dealt with speedily. It was the unanimous submission of trade unions to the Commission that the delays involved under the present procedures are frustrating insofar as applications by construction trades are concerned. Representatives of some employer groups concurred.

I find that a minimum time lapse of approximately 20 days is now to be normally expected for the processing of construction applications. A few are disposed of in a somewhat shorter period but in a considerable number of cases the delay has been greater, extending up to 90 days or more. A Construction Industry Panel of the Board, additional staff, and special procedures could probably reduce the minimum delay by five or six days and also reduce delays in complicated cases.

I recommend that the Labour Relations Act should declare a policy that construction industry cases be expedited, having regard to the special nature of the industry; that special provisions be made in the Rules of Procedure of

the Board for the expeditious processing of such cases by the Construction Industry Panel; that Hearing Officers with the rank of Deputy Vice Chairmen be appointed and that the services of such Hearing Officers be used as far as possible to expedite proceedings; that the findings of facts by Hearing Officers be final for collective bargaining without public hearings upon the report of a Hearing Officer, subject to review by the Board at the request of an interested party.

Implementation of these recommendations for expediting construction industry cases will require the appointment of competent additional staff by the Board, and a corresponding increase in its budget. In my opinion, this is essential for effective application of the Act to the industry. An adequate number of Hearing Officers and competent Examiners is particularly required if the needs of the construction industry are to be met.

10. The Commissioner made various recommendations. Included in these recommendations were:

1. Special provisions governing the construction industry should be embodied in The Labour Relations Act.

2. Area certification should be the general rule and the Board should restrict project certification to long-range projects of a special nature; this policy should be set out in the legislative provisions relating to the construction industry.

3. In construction cases the Board should not wait until a representative group of employees is at work but should issue an area certificate upon the union establishing that it has the requisite number of members among the employees in the unit at the time the application is made.

4. The Labour Relations Act should declare a policy that construction industry cases be expedited, having regard to the special nature of the industry. Special provisions should be made in the Rules of Procedure of the Board for the expeditious processing of such cases by the Construction Industry Panel.

These recommendations were carried into effect and included in the provisions of *The Labour Relations Amendment Act, 1961-62, supra*, and in amendments to the regulations under The Labour Relations Act. Since the introduction of these amendments to the Act, the Board has ever been mindful of the need for the expeditious handling of applications for certification in the construction industry.

11. *The Labour Relations Act, 1961-62, supra*, provided a new framework for the determination of the appropriate bargaining unit in applications for certification in the construction industry. Reference is made to sections 106 and 108 of the Act. This frame of reference has remained unchanged and The Labour Relations Act continues to express the same policy down to the present time. Since the enactment of *The Labour Relations Act, 1961-62, supra*, there has not been any change in the Act which affects the determination of

appropriate bargaining units in the construction industry. The introduction of a scheme of accreditation for employers' organizations in *The Labour Amendment Act, 1970 (No. 2)*, S.O. 1970, c.85, and the recent introduction of province-wide, multi employer-bargaining in the industrial, commercial and institutional sector in *The Labour Relations Act, 1977*, S.O. 1977, c.31, have not in any way modified that frame of reference. The amendments to the Act in 1970 and 1977 have clearly been directed towards the consolidation of groups of parties within the process of collective bargaining rather than to the acquisition of bargaining rights through the process of certification.

12. The Board has not usually determined appropriate bargaining units with reference to sectors of the construction industry. The apparent exception to this practice occurs where either Local 183 or Local 506 of The Labourers' International Union of North America has applied for certification in the Board's geographic area #8. However, although the Board does refer on these occasions to bargaining units in terms of residential construction, residential building projects or building projects, such bargaining units are determined in order to differentiate between the internal jurisdiction of these two local trade unions as determined by the Labourers' International Union of North America. In such instances the Board is not determining the appropriate bargaining unit because of the type of work being performed by an employer. The appropriate bargaining unit in such instances is being determined with reference to the division of construction work between these two local trade unions.

13. From time to time, since the introduction of the scheme of accreditation into the Act in 1970, the Board has been urged to define appropriate bargaining units with reference to the sector in which the employer was working at the time the application for certification was made. The Board has always rejected such an approach to the determination of appropriate bargaining units on the grounds that it would be premature to determine units with reference to a sector and that any distinction with respect to sectors is more properly the subject matter of collective bargaining. See, for example, the *Menard Brothers Limited* case, [1972] OLRB Rep. May 460; the *Eilpro Holdings Inc.* case, [1973] OLRB Rep. March 169; the *Mascioli Construction Company Limited* case, [1974] OLRB Rep. March 118; the *Transway Steel Buildings Ltd.* case, [1975] OLRB Rep. May 241.

14. In the Board's opinion the only exception to the determination of bargaining units in the construction industry without reference to a sector is to be found in those instances where one trade union is endeavouring to displace another trade union and the bargaining unit in a collective agreement has been defined by the parties thereto with reference to a sector, or, where the parties to a collective agreement have regarded and interpreted a collective agreement as being restricted to particular types of work or sectors of the construction industry, see, for example, the *Allied Acoustic Limited* case (Board File No. 2096-76-R, unreported decision dated March 16, 1978), or where considerations of timeliness of an application for certification arise with respect to a collective agreement which by its terms covers various sectors. See, for example, the *Malen Steel & Salvage Company Limited* case, [1978] OLRB Rep. May 435.

15. The desire of the respondent to be insulated from what it perceives to be the effects of province-wide, multi-employer bargaining in the industrial, commercial and institutional sector is not a reason to restrict the appropriate bargaining unit to "engaged in residential construction". This concern of the employer is more properly a matter for collective

bargaining between the parties. In determining the appropriate bargaining unit without reference to a sector, the certificate will apply to the respondent's operations to the extent that the respondent engages in one or more sector. The need to expedite applications for certification in the construction industry is as relevant today as it was in 1962. The concerns of Mr. Goldenberg on the frustrations caused by delay remain the concern of the Board. Questions which may arise out of determinations with respect to sector are matters which contain the potential for delay. In our view, such delay would serve no useful purpose. Collective bargaining by groups of employers and trade unions with reference to types of work analogous to sectors have proceeded over the years before the introduction of the concept of sectors in the scheme of accreditation in 1970 and before the introduction of province-wide, multi-employer bargaining in the industrial, commercial and institutional sector. The Board is not persuaded that the definition of appropriate bargaining units without reference to sector would frustrate collective bargaining in the construction industry. The respondent did not refer to a single example of difficulty in collective bargaining which such an approach would create. On the other hand, the determination of appropriate bargaining units with reference to sector might well cause delay to the process of certification, might well cause repetitive applications for certification and might well cause the delay and frustration referred to by Mr. Goldenberg without any meaningful benefit to the process of collective bargaining in the construction industry.

16. Having regard to the foregoing, the Board further finds that all electricians and electrians' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 10, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

0176-78-JD Mac J. Brian Mechanical Ltd.,(complainant), v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Donald Stewart and James Phair, (Respondents).

Jurisdictional Dispute – Whether parties have provided alternative forum for resolution of jurisdictional dispute – Whether Board has jurisdiction

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

APPEARANCES: *C. F. Clark and Richard Brian for the complainant; C. M. Mitchell and N. Wilson for the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700; L. C. Arnold and Dick Pearn for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552; Donald Stewart and James Phair on their own behalf.*

DECISION OF THE BOARD; November 21, 1978

1. This is a complaint under section 81 of The Labour Relations Act.
2. In a decision dated May 1, 1978, the Board made an interim order. In a decision dated September 26, 1978, the Board affirmed its decision dated May 1, 1978.
3. As a preliminary matter the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 ("Local 700") raised the fact that Jerry Boyle, who had appeared on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 ("Local 552") at the hearing on May 1, 1978, and who also appeared on behalf of Local 552 at the hearing on November 14, 1978, was now an employee of the complainant. It was not disputed that at the time of the hearing on May 1, 1978, Mr. Boyle was the business manager of Local 552. Local 700 stated that it was concerned by this state of affairs which it regarded as odd. The complainant stated that it was not taking any issue with Mr. Boyle acting on behalf of Local 552. Local 552 informed the Board that Mr. Boyle remained a member of Local 552, that he was familiar with the circumstances of this complaint and that he was still assisting Local 552 in the presentation of its case as a respondent. The Board does not find the state of affairs with respect to Mr. Boyle to be odd and is not concerned by his becoming an employee of the complainant since May 1, 1978. Neither Local 552 nor the complainant have expressed any concern with respect to Mr. Boyle's position. There is frequently in proceedings under section 81 of The Labour Relations Act a common identity of interests between an employer and one of the two or more trade unions which are parties to such a proceeding.
4. In this complaint the Board endeavoured to use a method of securing the evidence from the parties with respect to a request for a direction under section 81(1) whereby, hopefully, the amount of time required to obtain the evidence would be substantially shortened. In this way the cost of this direction to the parties would be reduced and the Board would be able to issue its decision at a much earlier date than would otherwise be the case. Initially all of the parties to this proceeding agreed on this method. Eventually Local 700 informed the Board that it was not prepared to proceed either under this method or under the normal procedure of a regular hearing by the Board. Local 700 then raised certain preliminary matters before the Board.
5. Local 700 argued that by virtue of section 81(14) of The Labour Relations Act the Board was precluded from inquiring into this complaint. Section 81(14) states:

The Board shall not inquire into a complaint made by a trade union, council

of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

Local 700 relied on the fact that in the collective agreement between the Mechanical Contractors Association of Windsor and Local 552, which is binding on the complainant, the complainant has agreed to refer any jurisdictional dispute to the National Joint Board for the Settlement of Jurisdictional Disputes or any successor agency of the Building Trades Affiliates. Local 700 does not have a collective agreement with the complainant and the collective agreement between Local 552 and the Ontario Erectors Association does not contain any similar provision for the referral of jurisdictional disputes.

6. This complaint concerning work assignment was filed with the Board on April 26, 1978. On April 29, 1978, Local 700 wrote to Fred J. Driscott, Jr., the chairman at the Impartial Jurisdictional Disputes Board, referred to the fact that members of Local 552 were doing the work in question and requested assistance. A similar telegram was sent to John H. Lyons, the general president of the International Association of Bridge, Structural and Ornamental Ironworkers, (the "Ironworkers"). There was an exchange of correspondence between Mr. Driscoll, the complainant, Ranta Enterprises, Mr. Lyons, the general president of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the "UA") and J. R. St. Eloi, the director of Canadian Affairs of the UA. The correspondence indicates sharp differences over the facts which surround this complaint with respect to the assignment of work. At no time did the complainant or Local 552 refer this complaint concerning work assignment to the Impartial Jurisdictional Disputes Board.

7. The Board has previously considered a similar factual situation to the instant complaint in the *Adam Clark Company Limited* case, 76 CLLC ¶16,053. In that case the Board stated at page 702:

Section 81(14) is, in our opinion, open to two interpretations where "trade union" and "collective agreement" may be considered in the singular or in the plural. Since the language of section 81(14) is reasonably capable of two constructions a choice may be made. As was stated by Finnmere, J. in *Holmes v. Bradfield* [1949]2 K.B. 1, 7:

It is, however, common practice that if there are two reasonable interpretations, so far as grammar is concerned of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things.

The object of section 81(14) is also relevant. Section 81 provides a forum for the settlement of jurisdictional disputes and section 81(14) creates an exception to the jurisdiction of the Board where the parties have made private arrangements for the settlement of jurisdictional disputes. The Board in con-

structing the words "trade union" and "collective agreement" in section 81(14) to include "trade unions" and "collective agreements" adopts the reasoning of Viscount Simon in *Nokes v. Doncaster Amalgamated Collieries Limited* [1940] A.C. 1014, 1022, where stated:

...if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

The Board now considers the instant case which in our view, is similar to the *Fraser-Brace Engineering Company, Limited* case, *supra*. Local 793 has a collective agreement with the complainant which contains a provision of the type referred to in section 81(14). Local 46, has a collective agreement with the complainant which does not contain a provision of the type referred to in section 81(14). The instant case is to a degree similar to the *Fraser-Brace Engineering Company Limited* case, *supra* in that where an employer and two trade unions provide in two collective agreements for different methods of resolving a dispute there can no more be a resolution of any difference among or between them arising out of work assignment than there can be in the instant case where one collective agreement contains a provision of the type referred to in section 81(14) and one collective agreement does not contain such a provision. For the foregoing reasons the Board finds that the difference as to work assignment cannot be resolved under the collective agreement or collective agreements within the meaning of section 81(14) of *The Labour Relations Act*.

8. On the facts before it, the Board finds that there is not a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement within the meaning of section 81(14) of the Act. Accordingly, the Board finds that it is not precluded from inquiring into this complaint.

9. The Board notes that Local 700 has stated at the hearing that it is withdrawing from this complaint and that it will accordingly not be participating in the merits of this complaint. The Board also noted that Local 700 expressed its frustration at the length and complexity of proceedings under section 81 of *The Labour Relations Act*. The Board expresses its regret that Local 700 did not give the Board's proposed method for expediting this proceeding a chance to prove itself.

10. The Registrar is directed to list this complaint for a hearing on the merits.

1195-78-R Retail Clerks International Union, (Applicant), v. Maclean-Hunter Cable TV Limited, (Respondent).

Certification – Construction Industry – Jurisdictional Dispute – Board finding that it has no jurisdiction over employees in cable television business

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Ted Wohl, Les Dowling and David Vandivier for the applicant; R. A. Werry and A. Lamb for the respondent.*

DECISION OF THE BOARD; November 17, 1978.

1. The name: “MacLean Hunter Cable Television” appearing in the style of cause of this application as the name of the respondent is amended to read: “Maclean-Hunter Cable TV Limited”

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the Respondent employed at and out of the city of Guelph, Ontario save and except technical supervisors, persons above the rank of technical supervisors, office staff, sales staff and persons employed in the production studio of the employer, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Counsel for the respondent questioned the Board’s jurisdiction to hear the instant application. He submits that the respondent’s Cable Television and F.M. radio broadcasting business is an undertaking extending beyond the limits of the Province and that its labour relations are therefore within the exclusive legislative authority of the Parliament of Canada pursuant to section 92 (10) (a) of the *British North America Act*. That section of the BNA Act is as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, –

10. Local Works and Undertakings other than such as are of the following Classes: –

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

6. The facts are not in dispute. The respondent was licenced by the Canadian Radio

Television Commission to carry on a broadcasting receiving undertaking on October 1, 1975. It receives radio and television waves by means of an antenna at its facilities in Guelph and distributes the signals to subscribers in the Guelph area by means of a cable system. Some of the signals received and distributed originate in the United States and some originate in Canada.

7. The employees sought to be represented by the applicant are employed in the technical aspects of the respondent's broadcasting receiving business. They operate and maintain the equipment that receives the radio and television waves and they install and service the cables that distribute the signals to subscribers.

8. In *Re Regulation & Control of Radio Communication, A. G. Que. v. A. G. Can.*[1932] A.C. 304 (P.C.) the Judicial Committee of the Privy Council determined that broadcasting fell within the legislative authority of the Parliament Of Canada as one of the excepted undertakings within section 92 (10) (a) of the BNA Act. The British Columbia Court of Appeal found that a cable broadcasting service identical to the respondent's was within the exclusive legislative competence of the Parliament of Canada in *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2nd) 716. That conclusion was endorsed by two recent decisions of the Supreme Court of Canada: *Capital Cities Communications Inc. v. C.R.T.C.* (1977), 8 1 D.L.R. (3d) 609; *Re Public Service Board, Dionne and A. G. Can.* (1977), 83 D.L.R. (3d) 178. In both of these cases Laskin C.J.C. concluded that broadcasting of the kind performed by the respondent does not lose its character as a federal undertaking or become a separate undertaking for constitutional purposes merely because it receives Hertzian waves and disseminates them by means of a different technology. Cable broadcasting is an activity that falls exclusively within the jurisdiction of the Parliament of Canada.

9. In light of the above authorities this Board finds that it is without jurisdiction to hear the instant application by reason of the provision of section (92) 10 (a) of the *British North America Act* and section 108 of the Canada Labour Code, R.S.C. c.L-1, as amended. The application is therefore dismissed.

**0039-78-R Canadian Union of Public Employees, (Applicant), v.
Metropolitan Toronto Association for the Mentally Retarded, (Respondent).**

Certification – Employee – Whether “supervisors” exercise managerial functions

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

DECISION OF THE BOARD; November 14, 1978

1. This is an application for certification in which the Board in its decision dated May 16, 1978 determined that two separate units of employees of the respondent would be appropriate for collective bargaining. These units were designated as bargaining unit #2.

By a decision dated October 5, 1978 the Board directed that a certificate be issued to the applicant with respect to bargaining unit #2.

2. On May 16, 1978 the applicant was certified on an interim basis for bargaining unit #1 pending a final determination as to whether or not supervisors and assistant supervisors should be excluded from the bargaining unit. Subsequently a Labour Relations Officer held an inquiry into the duties and responsibilities of the individuals classified by the respondent as supervisors and assistant supervisors.

3. The report of the Labour Relations Officer indicates that each of the supervisors is the most senior person employed at one of the residences operated by the respondent. One of the supervisors, Mr. R. Newans, has responsibility for two such residences. The supervisors are responsible for co-ordinating and supervising the activities of the staff at their respective residences. The number of other staff involved varies from a low of 3 full and part-time staff at the Kinston Road residence to a high of 16 at the Sheppard Ave. residence. All of the supervisors work directly with the respondent's clients, but the time so spent is limited by their supervisory and related duties. The supervisor of one of the smaller residences stated that she spends about 80 per cent of her time in direct client contact, while the supervisor of the large Sheppard Avenue residence indicated she is directly involved with clients for only about 10 per cent of her time.

4. The supervisors prepare staff schedules and schedule employee vacations. Within certain limits they can also schedule overtime work and grant time-off.

5. The supervisors are responsible for doing formal evaluations of the employees they supervise. Several of the supervisors have recommended employees for promotion, and these recommendations have generally been acted upon. The supervisors do not appear to have any direct authority to discipline or discharge employees, but all feel that they can recommend such action. The effect of making a recommendation that an employee be discharged is difficult to fully assess due to the limited number of occasions that it has occurred. At one point an employee at the Sheppard Avenue residence resigned giving two weeks notice. However, Ms. Sniderman, the supervisor of the residence, and Mr. Montagnes, the respondent's Director of Accommodations, together concluded that the individual involved should be paid for the two weeks but not actually be allowed to work them. A recommendation to this effect was accepted by the respondent. On another occasion Ms. Tanchuk, the supervisor at the Huntley Street residence, recommended that a staff member be dismissed. The individual involved, however, resigned before the recommendation could be acted upon.

6. All of the supervisors have had some involvement in the hiring of new staff. With respect to full-time residential councillors the supervisors do an initial screening interview of job applicants. The final decision as to who should be hired, however, is left to the respondent's senior staff, albeit with some input from the supervisor involved. With respect to part-time staff, the supervisors not only interview job candidates but also make the actual decision as to who should be hired. A part-timer selected in this manner is later required to meet with a member of the senior staff, but there appears not to have been any occasion where a supervisor's decision to hire a particular part-timer has been overturned.

7. Having regard to the above, we are satisfied that the supervisors do in fact exer-

cise supervisory authority and that they can materially affect the employment relationship of those they supervise. We are also satisfied that the supervisors play a central role in the hiring of new employees, particularly those hired for part-time positions. We view these as being managerial functions. Accordingly we are of the opinion that persons classified by the respondent as supervisors do exercise managerial functions and thus are deemed by section 1 (3) (b) not to be employees for the purposes of the Act. Accordingly supervisors will be excluded from bargaining unit # 1.

8. The respondent employs two assistant supervisors, namely Ms. Leila Fulton and Ms. Cathy Koenig. Both of these people work at the respondent's residence for the severely retarded on Sibley Street. They work under the direction of Mr. John Devlin who is classified by the respondent as a senior supervisor.

9. The two assistant supervisors share responsibility for the direct supervision of some 23 full and part-time staff. They do the staff scheduling, although it is subject to the approval of Mr. Devlin. They have authority to authorize a certain amount of overtime work and to grant time-off. Mr. Devlin has the final say with respect to the scheduling of staff vacations. The assistant supervisors do assessments of employees, which they submit to Mr. Devlin. Although it has not happened, both assistant supervisors indicated that if an employee were to disagree with the assessment given to him by an assistant supervisor the matter would be referred to Mr. Devlin. Both of the assistant supervisors feel that they can recommend the dismissal of an employee to Mr. Devlin, although neither has done so. It appears that if such a recommendation were made it would be Mr. Devlin who would decide whether such a dismissal would be recommended to the respondent's senior staff. Ms. Koenig did at one point recommend to Mr. Devlin that an employee be promoted, and this was followed through on. However, on another occasion she recommended to Mr. Devlin that an employee receive a wage increase but the recommendation was not accepted. Mr. Devlin attends meetings with the supervisors of the other residences, but the assistant supervisors do not.

10. The assistant supervisors do have some input into the hiring of employees, but to a much lesser extent than do the supervisors. One of the assistant supervisors along with Mr. Devlin interviews applicants for a job opening. After consulting with the assistant supervisor Mr. Devlin selects 2 or 3 of the applicants for each position, and then leaves the final decision as to who should be hired to Mr. Montagne, the Director of Accommodations.

11. On the basis of these considerations we are of the opinion that while the assistant supervisors assist in the supervising of staff they do not exercise the type of independent decision making associated with managerial authority. Such authority, instead, appears to rest with Mr. Devlin, the senior supervisor. Accordingly we are of the opinion that the persons classified as assistant supervisors do not exercise managerial functions and therefore they should be included in bargaining unit # 1.

12. In the light of the above conclusions, and the decision of the Board dated May 16, 1978, the Board determines that bargaining unit # 1 should be defined as follows, namely:

All employees employed by the respondent in the municipality of Metropolitan Toronto employed in its adult residence service, save and ex-

cept supervisors, persons above the rank of supervisor, office and clerical staff, house-keeping, domestic and maintenance employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

13. A formal certificate will now issue to the applicant with respect to bargaining unit #1.

0272-78-R; 0273-78-R; 0756-78-R Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant), v. **Dominion Stores Limited and Min-A-Mart Limited**, (Respondents). Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant), v. 368970 Ontario Limited, carrying on business as Discount Food Warehouse, (Respondents).

Related Employer – Complicated series of transactions undertaken in order to segment retail food market and exploit consumer demand for “convenience food” retailing outlets – Common control and direction maintained – Some sharing of brands – Section 1(4) declaration made in situation where union did not delay application – Dissimilarity of markets insufficient to justify refusal to make declaration.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Paul Cavalluzzo, David Starkman, Alex Murcer and Bob McKay for the respondents; C. G. Riggs, J. B. Williams and D. K. Gray for the respondents.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD:

1. The style of cause in Board File No. 0273-78-R and Board File No. 0756-78-R is amended by deleting the name of the respondent “Discount Food Warehouse” and substituting therefor “368970 Ontario Limited, carrying on business as Discount Food Warehouse”.

2. Pursuant to agreement of the parties the Board ordered the consolidation of files 0272-78-R, 0273-78-R and 0756-78-R and the same are hereby consolidated.

3. We are concerned with applications under section 1(4) of The Labour Relations Act relating to each of the respondents and an application under section 55(2) of the Act in respect to the respondent, 368970 Ontario Limited which for ease in reference will be hereafter referred to as “Discount Food”.

4. The applicant is a trade union and party to a collective agreement between itself and Dominion Stores Limited which is effective from October 4, 1976 to June 21, 1978. Dominion Stores Limited operates a chain of supermarket grocery stores throughout the province of Ontario which fall within the scope of the collective agreement referred to.

5. We intend to deal first with the section 1(4) application relating to Min-A-Mart Limited. Min-A-Mart Limited was incorporated August 23, 1976 as "341438 Ontario Limited" and subsequently made the name change to the present designation on December 21, 1976. The company now has five stores operating under the corporate name which commenced operations on September 1, 1976, December 29, 1976, September 21, 1977, May 1, 1978 and June 14, 1978. One of these stores has been operating under a franchise agreement since its inception, May 1, 1978, and another store operated as a direct company operation between September 21, 1977 and May 1, 1978 when it was turned over to a franchisee: the remaining three stores continued as of the date of the hearing to be direct company operations. Two of the store locations had previously been utilized by Dominion Stores Limited but had been disused for 4 ½ years and 14 months respectively at the time of Min-A-Mart's occupation. One store, in a new strip centre, had never been occupied previously; another had been a Royal Bank location and the other, previously occupied partly by a sporting goods retailer and partly by Hunts Bakery.

6. Mr. Robert Benjamin, who is employed and paid by Dominion Stores Limited as "Manager Convenience Store Operations" and reports to Mr. Jas Williams, Vice-President – Corporate Planning and Development of Dominion Stores Limited, was involved in the initial concept research in both United States and Canada and concentrated on convenience stores such as Beckers and Macs Milk as to locations, concept, design engineering, merchandising and personnel.

7. We are told that convenience stores differ from food markets in a number of particulars, such as:

- (a) size – supermarkets average 24,000 – 35,000 sq. feet and carry 8,500 – 11,000 product lines. Convenience stores range from 400 – 2,400 sq. feet and carry 800 – 3,000 product items.
- (b) hours of operation – supermarkets are open 2 – 6 nights per week for a total of 72 – 85 hours. Convenience stores are generally open 98 hours per week.
- (c) functions of employees – supermarket employees have narrow, specialized assignments. Convenience store employees have a wide spectrum of assignments.
- (d) market segment – convenience stores may generate multiple shopping stops during a week of low dollar amounts, versus supermarket lesser number of shopping stops but larger dollar per stop order.

8. In respect to the corporate relationship between Min-A-Mart Limited and Dominion Stores Limited, evidence was given that Min-A-Mart is wholly owned by Quintana Limited which is wholly owned by Dominion Stores. All directors of Min-A-Mart are also directors of Quintana and Dominion Stores and all the officers of Min-A-Mart are also officers of Quintana and Dominion Stores. The Min-A-Mart concept was conceived by the Executive Committee of the Dominion Stores' Board of Directors and the name selected by Benjamin and two other Dominion Stores' executives and approved by Dominion Stores' management.

9. Initial capital for Min-A-Mart was advanced by Quintana at bank interest rates and funds for on-going capital budgets are similarly supplied.

10. Mr. Benjamin, who is the Min-A-Mart operating head maintains an office at Dominion Stores' head office location, has a private telephone line, and shares a secretary with his supervisor, Williams. Min-A-Mart also is serviced by Dominion Stores' accounting department in respect to all financial transactions, and legal services all of which result in charge backs of Min-A-Mart (as does Benjamin's salary).

11. The evidence was that in respect to store locations these are approved by Dominion's internal management and the Board of Directors approves the annual development budget and a quarterly review of operating results is conducted by Dominion. All of the day-to-day operations are in the hands of Benjamin and there is no contact by Dominion Stores' personnel made below his level. This relates to pricing, purchasing, merchandising, advertising, store layout, fixtures, labour relations etc.

12. The source of merchandise sold by the Min-A-Marts was testified to be Dominion Stores warehouse in respect to some 40% of its total volume, and which is ordered by Min-A-Marts in the same way as any Dominion Store would order and is delivered on Dominion Stores' trucks (or by other truckers as might also be the case with Dominion. Min-A-Mart's locations are assigned a store number in the ordering process in the same manner as a Dominion Store's locations. The same product code numbers are used and the same format of internal order processing forms. In respect to the remaining 60% of the merchandise it is provided from Min-A-Mart's own list of approved suppliers.

13. In respect to the franchised operations, we are told that advertising for franchisees was done in one case over a "Box No" and in the other case over Dominion Stores' name. Benjamin was responsible for the final selection of franchisees.

14. The store at 150 Berry Road was opened on September 21, 1977 on premises formerly occupied in part by a sporting goods store and in part by a Woman's Bakery and operated by Min-A-Mart through April 30, 1978 located in the same strip plaza and some 300 feet away there is a Dominion Store. It was franchised to Palmac Business Services Limited from May 1, 1978. The franchise agreement entered into between Min-A-Mart and Palmac was joined by Dominion Stores which guarantees to hold Palmac harmless against claims arising out of the Bulk Sales Act, and by Paul Mc Quard as a guarantor of all obligations of Palmac. The agreement is for a period of five years with Min-A-Mart having right of first refusal if Palmac wishes to sell the franchise and Palmac having right of first refusal in respect to renewal of franchise. Concurrent with the franchise agreement there was executed a sub-lease of the premises. The franchise agreement is executed on behalf of Min-A-Mart Limited by A.W.T. Tomlin as President and by M. L. Wasik as Secretary and on behalf of Dominion Stores Limited by A.W. Tomlin as Vice-President and M.L. Wasik as Secretary.

15. The store at 1221 King Street West opened on May 1, 1978 is in premises previously occupied by Dominion Stores and which had been unoccupied for 14 months prior to the entrance by the Min-A-Mart franchisee. The initial lease with Dominion Stores had been cancelled and currently the head lessor is McDonalds who operate in part of the premises and who sub-lease part of the premises to each of Min-A-Mart and Cadet cleaners.

16. The policy of the company is stated to franchise all store operations within six months of their commencement, with the intervening period used to build volume and demonstrate profitability. It was given in evidence that on franchising Min-A-Mart ceases to maintain any employer-employee relationship. In the case of Berry Road one full-time employee of Min-A-Mart who had been Assistant Manager severed his employment and was employed by the franchisee (3 other full-time employees were absorbed in other Min-A-Mart operations). Additionally two persons formerly employed part-time by Min-A-Mart are now employed by the franchisee and this is explained as being because of their residing in that area.

17. Under the terms of the franchise agreement the franchisee is required to purchase his supplies through Min-A-Mart using the Min-A-Mart order guide both for those items purchased through Dominion Stores' warehouse and in respect to other approved suppliers where a franchisee wishes to stock items not included in the order books. The franchisee may, with written approval, order from other sources. The franchisee is required to pay for his purchases within seven days. Min-A-Mart provides counsel and assistance in respect to financial and inventory controls, local advertising and promotion, and financial analysis of operating results.

18. The remaining three stores under direct operation by Min-A-Mart are as follows:

- (1) 4410 Kingston Road in premises formerly occupied by the Royal Bank and opened by Min-A-Mart, September 1, 1976.
- (2) 418 Spadina Road which occupies the premises once occupied by Dominion Stores and which had been vacant for 4 1/3 years at the time Min-A-Mart took occupancy on December 29, 1976.
- (3) 6021 Yonge Street in premises never previously occupied by anyone and being located in a new strip plaza and occupied by Min-A-Mart since June 14, 1978.

19. The evidence establishes that in respect to Min-A-Mart's operations that there is nothing on store premises which indicates a Dominion Store's connection. There are no signs, employees' uniforms have no corporate identification and are dissimilar to Dominion Stores. There is nothing on merchandise offered for sale to indicate a Dominion Store's involvement: all advertising is done solely over the name of Min-A-Mart. Additional indicia of separateness of image to the consumer and to employees are inferred from the fact that no Dominion Stores' employees at the store level have been hired or transferred to Min-A-Mart. There is no contact of Min-A-Mart supervisory employees and Min-A-Mart employees: salary schedules based on convenience food industry: separate pay cheques. Evidence also establishes that renovations and repairs are handled in the name of Min-A-Mart.

20. At the general management level there is Benjamin who is an employee of Dominion and who reports upwards into the Dominion Management and who has lateral and downward contacts within the Dominion organization.

21. The applicant union states that it has made no attempt to talk to Min-A-Marts' employees or to organize them into the union and further that they have no reason to be-

lieve that Min-A-Marts' employees consider they work for Dominion Stores, nor has the union made any attempt to ascertain the views of those employees in respect to this application.

22. The first question we must decide is whether the employees of Min-A-Mart are persons who could be encompassed by the scope of the collective agreement between the applicant and Dominion Stores, save for the interposition of Min-A-Mart Limited. That collective agreement recognizes the applicant "for and on behalf of all employees of Dominion Stores Limited in its retail stores in the municipalities of Metropolitan Toronto ...", and further provides that

"Should the Company open stores within the townships set out in the attached schedule the Company will recognize the Union as the bargaining agent and such stores will be covered by this agreement."

In our view the effect of this language is that if a declaration were made that Dominion Stores and Min-A-Mart constituted one employer for the purposes of The Labour Relations Act, the employees would fall within the scope of the collective agreement.

23. The evidence clearly establishes that Min-A-Mart Limited and Dominion Stores Limited are under common direction and control by virtue of ownership, financial dependency, inter-locking executive officers, inter-locking directors and corporate officers, shared premises and services.

24. The respondents argue that there is sufficient dissimilarity in markets served and in mode of merchandising to justify a conclusion that the "convenience store" segment of the retail food business is separate from and not in direct competition with, the "supermarket" segment, and that Min-A-Mart's direct competition is other convenience stores in hours, labour costs and customers. While it is true that convenience stores add a dimension of ease of accessibility relating particularly to physical location vis-a-vis the customer and relating to hours of availability, those articles which are for sale are basically the same as available in the supermarket (indeed in Min-A-Mart's case, a large percentage are *identical* to those available in Dominion). It seems to us that the difference exists solely in the merchandising technique. The convenience store depends on its location and its hours, the supermarket on its wider range of selection and its price. In each case they are courting the same consumer sale and depend on their different uniqueness of merchandising to influence the final consumer decision. We are of the opinion that the retail activities of Dominion and Min-A-Mart are related.

25. Despite the inter-relationship of activities we do not view this as an appropriate case for the Board to exercise its discretion to issue a declaration under section 1(4) in view of the long lapse of time between the opening of the first Min-A-Mart store and the first evidencing of interest in the bargaining rights by filing a grievance fifteen months later. That, together with the fact that the applicant has not yet made any contact with the employees of Min-A-Mart, and that it was on May 8, 1978, that this application was filed brings the instant application within the rationale of (*H. Allaire and Sons Company Ltd.* [1974] OLRB Rep. July 457). The Board is not prepared to exercise its discretion under section 1(4) where bargaining rights have been left exposed for the time here involved and the application is therefore dismissed.

26. We turn now to the applications made under section 1(4) in respect to Discount Food Warehouse.

27. 368970 Ontario Limited was incorporated on October 14, 1977 and the trading name "Discount Food Warehouse" was registered October 21, 1977. At the time of trading name registration, the response to a question on the registration form as to "business activity or service to be carried on in or identified by the registered name" the reply was recorded as "Retail Food Chain".

28. Discount Food Warehouse occupies, since November 1, 1977, premises formerly occupied by Dominion Stores Limited up to September 5, 1977 under a lease made between Richmond Hill Shopping Centre and Dominion Stores Limited which has now been assigned to Discount Food Warehouse.

29. Mr. Siegal, who is General Manager of Discount Food Warehouse, testified that he had been employed by Dominion Stores Limited for 21 ½ years and continues to be so employed. According to Siegal he had been given an assignment by Mr. Jas Williams, Vice-President of Corporate Development of Dominion Stores Limited, to make a study in the United States of new types of retail food operations designed to "discount at the lowest possible price to the consumer" and to make a recommendation as to the feasibility of Dominion Stores establishing similar operations in Canada. It was as a result of this investigation and recommendation that the decision was made by Dominion and the name "Discount Food Warehouse" was selected by Williams from a list of four names proposed by Siegal.

30. In respect to the corporate relationship of Discount Food Warehouse to Dominion Stores the evidence is that Discount Food is wholly owned by Quintana which is wholly owned by Dominion and there are common directors and officers to all three corporations. There was an inter-company advance of \$150,000 by Quintana for the start up at bank rates and not evidenced by a loan agreement. Discount Food requires Dominion's approval of capital budgets and of individual locations and participates in a quarterly review of its operating results by Dominion. Siegal, General Manager of Discount Foods considers Williams, Dominion's Vice-President, to be his "boss" and will talk to Williams three or four times per week about current items and would report to him in respect to any major money expenditure. Siegal continues to be paid by Dominion and to participate in their pension and benefits plans as did another Dominion employee who was transferred to Discount Food for a short period and then re-transferred. The head office of Discount Food is at Richmond Hill and mail is directed to that location.

31. Within the Dominion organization there is an employee, Scollery, who is known as Subsidiaries Accountant. A bank loan for the initial budget was negotiated by Scollery at a bank close to Scollery's office which is in the Dominion Stores' head office. The employment application form used was designed by Scollery and is similar to Dominions. Daily receipts of Discount Food are transferred by Brinks to this bank. Scollery processes all Discount Food's payables and receivables. Discount Food receives a statement of transactions and is also charged for the services performed by Scollery and other accounting personnel. A similar arrangement is in effect in respect to legal services performed by Scollery and other accounting personnel. A similar arrangement is in effect in respect to legal services provided to Discount Food by Dominion's staff. Counsel in these proceedings for Discount Food was retained by Williams and charges will go to Discount Food.

32. Siegal first entered the store location around September 20, 1977 and states that at that time there were no Dominion Stores's logos or signs visible. Also at that time all Dominion Stores's product inventory had been removed either through sale to consumers or transfer to other Dominion Stores, and, we are told, persons previously employed there had been transferred to other locations. Siegal planned the store layout based on his U.S. observations. Some equipment which had been used by Dominion was transferred to Discount Food at book value using a standard Dominion transfer form. Other equipment, particularly store-room racks of different sizes then used by Dominion, were bought by Siegal from independent suppliers. All contracting incidental to the renovations was done by Siegal.

33. In respect to the assignment of lease by Dominion to Discount Food the evidence is that there were no changes in the contract clauses including those relating to the lessor's covenant not to lease other premises in the Shopping Centre to a chain store, a grocery store or a fish market. Nor was there any change in the rental charged for the premises which is based partially on a percentage of sales volume.

34. The differences in the Discount Food operation from the Dominion operation are principally in that,

- (a) Customer services are eliminated with the customer doing his own pricing.
- (b) Bags and/or boxes in which the customer can remove his purchases are not supplied but are available at a charge.
- (c) There is no fresh meat counter – only frozen meats.
- (d) It is a five day operation – Tuesday through Saturday rather than a six day operation.
- (e) Uniforms are not supplied to male employees: uniforms are supplied to female employees and are quite different to those of Dominion Stores.
- (f) Products sold are only those which can be purchased at a price which will be below Dominion's regular price.

35. In staffing Discount Food it was done entirely from walk-in applicants and none of those hired had previously worked at that location when it was operated by Dominion. Clerks are required to do all jobs rather than specializing. The salary schedule is established by Siegal and the employees are paid in cash on Wednesdays (versus Dominion's practice of paying by cheque on Thursdays). There is no contact at the employee level with Dominion's supervisory personnel.

36. The evidence of Siegal was, that of the products sold by Discount Food, about 20% are purchased through the Dominion Warehouse: the remaining 80% are from direct suppliers, most of whom we are told would not be suppliers to Dominion because of their inability to supply in the quantities required to satisfy Dominion volumes. Those supplies ordered from Dominion are ordered out of the Dominion's Order Guide. Discount Food is

assigned a unit number and their orders are programmed into the general Dominion system and the only difference being that Discount Food's name appear on the form together with their cost price. Such products are delivered by the same transport as deliver to Dominion stores and in the same manner and with the same shipping documents: Discount Food is assigned a store number which appears on the loading ship. Dominion's "no name" products are sold as are Bittner's meat products. According to Siegal, the interior of the store resembles a Dominion or Loblaw supermarket, except that prices are lower and that customers come from a wider geographic area and shop on the average of once every two weeks. Advertising is conducted in Discount Food's name and using an agency separate from Dominions.

37. Alex Mercer, a local union representative, testified that from observations made by him there were more items offered for sale by Discount Food which have price labels bearing the Dominion Stores' logo than plain price labels, and that almost everything in the frozen meat counter was marked with a Dominion price sticker as were several items in the spices' department. Mercer produced a number of products purchased by himself at Discount Food in substantiation of his observations. In respect to "No name" products Mercer also testified to his purchase of such items purchased from the Dominion Store at Newmarket and which, on their outer packaging, bore the legend "packed for Quintana" which is similar to the legend on "no name" products available in Discount Food. Mercer produced before the Board a number of such products.

38. Mercer testified that in telephone and personal conversations he has had with employees they have indicated "we all know it is Dominion Stores – there is Dominion Stores paperwork". He further testified that he had been approached by employees inquiring about the position of the union and that he informed them that a grievance had been filed on November 18, 1977. Mercer states that he has made no attempt to sign up employees as union members as he sees no point to that till the agreement is settled.

39. We shall deal first with the application under section 1(4) seeking a declaration that Dominion Stores Limited and 368970 Ontario Limited (Operating as Discount Food Warehouse) constitute one employer for the purposes of the Act.

40. The genesis of the food warehousing concept was the request by Williams, Dominion's Vice-President – Corporate Planning to Siegal to review this type of operation for its Canadian feasibility. The creation of 368970 Ontario Limited as a wholly owned subsidiary of Quintana which is in turn a wholly owned subsidiary of Dominion, speaks for itself in respect to the two operations being of common ownership. The evidence of advancement of a start-up loan, annual approval of capital plans and funds, quarterly review of operating results, policy decisions in the hands of Williams and a Board of Directors comprised of individuals who are directors and officers of Dominion must be viewed as establishing financial control and common management: the fact that Siegal is in charge of the regular day-to-day decisions cannot detract from the fact that the objectives and the plans are determined by Dominion's executives and that there exists a common control or direction.

41. The use by Discount Food of Dominion's accounting and legal staff services, access to Dominion's order book and warehouse facilities (and thereby to Dominion's purchasing expertise), access to the Dominion delivery system and accounting control forms provides ample base for a conclusion that there is a high degree of inter-relationship of the operations of the two corporations.

42. The fact that a substantial number of products offered for sale by Discount Food bear price stickers with the Dominion logo, and that Dominion's "no name" products are equally available at Discount Food in precisely the same packaging and bearing the legend, "packed for Quintana" is a firm representation to the public and to the employees that a single operation is involved.

43. The businesses engaged in by Dominion and by Discount Food must be considered to be associated or related. In the broad sense they are both "retail food chains" as 368970 Ontario Limited described its business when registering its trading style. It may be that each is pointed towards a different segment of the total market and to that end employ different mixes of product, service and price, but that does not obscure the fact that they are each striving to fill the consumer's retail demand for similar (and in many cases, identical) products in the retail food industry. The fact that a significant proportion (20%) of the products offered by Discount Food are also offered by Dominion and have been the subject of a single procurement agency and distribution system to retail outlets, would fortify that conclusion.

44. The respondents argue that, in any event, this is not a case in which the Board should exercise its discretion to make a declaration because to do so would interfere with the rights of unorganized employees to make their wishes felt in respect to the choice of a bargaining agent and would, in effect, circumvent the certification procedure. In the Board's view the instant case is not one in which the applicant is seeking to obtain bargaining rights which do not flow from its established relationship with the respondent employer.

45. The underlying purpose of section 1(4) is to preclude the erosion of bargaining units and bargaining rights through the utilization of separate legal entities as employers. The Board notes that in the collective agreement between the applicant and Dominion the parties have mutually defined the scope of coverage as including not only retail stores then existing, but also stores which the company should in the future establish. It appears, on the face of the agreement, that had all circumstances of this case remained the same except that the store had been opened by Dominion, then the employees so employed would have fallen within the scope of coverage. This, then, is the collective bargaining purpose to be served in this case by clarifying the actual employment relationship.

46. As we have previously noted the applicant in a case such as this has an obligation to move promptly to enforce its bargaining rights while the matter is fresh and unencumbered by developing interests of employees or other unions which could detract from those established bargaining rights. This the applicant has done both by the filing of the grievance of November 18, 1977 and its timely filing of this application.

47. The Board declares that Dominion Stores Limited and 368790 Ontario Limited constitute one employer for the purposes of *The Labour Relations Act*. Having arrived at this conclusion it is unnecessary for the Board to direct its attention to the application made under section 55(2) of the Act.

DECISION OF BOARD MEMBER W. H. WIGHTMAN:

1. I concur with the majority decision with respect to Min-A-Mart Limited but would have made the same finding even had the union acted in a more timely fashion in

filing a grievance or otherwise attempting to exercise what it perceived to be its rights. My reason for such a conclusion rests upon what I perceive to be the proper exercise of the Board's discretionary powers.

2. It seems to me we must look increasingly to the consequences of our decisions. This Company, in setting up both Min-A-Mart Limited and Discount Foods, made no effort to conceal the role of Dominion Stores in any legal sense. Efforts were made, in a merchandising sense, to differentiate the three in the minds of consumers for the very positive and, to my mind, socially desirable reason that this major food retailer wished to signal to the public the existence of two clear alternative retail services being offered to the public. Apart from the conventional supermarket retailing operation they were now offering, on the one-hand, "convenience" (as to hours of business) in the case of Min-A-Mart and on the other, "lower prices" in the case of Discount Foods.

3. It is my view that in exercising its discretion, the Board should not make decisions to the effect of which might be to discourage or hamper innovative approaches to retailing particularly when, as in this case of Discount Foods, the end objective is to provide the goods or services to the consuming public at lower prices.

4. I therefore would have dismissed the applications with respect to Discount Foods as well as Min-A-Mart.

0161-78-U Bricklayers, Masons Independent Union of Canada, Local 1, (Complainant), v. **The Metropolitan Toronto Apartment Builders Association**, Toronto Building and Construction Trades Council, (Respondents).

Collective Agreement – Construction Industry – Interference with Trade Union – Whether nonaffiliation or no subcontracting provisions illegal – Whether conduct pursuant to such provisions constitutes intimidation

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and M.J. Fenwick.

APPEARANCES: *Norman A. Endicott, Lynn Kaye, Otello Ungaro, Franco Grisoli and J. Meiorin for the applicant; W.J. McNaughton and K. Mallette for the respondent The Metropolitan Toronto Apartment Builders Association; A.M. Minsky, L. Greenspoon and C. Ballentine for the respondent Toronto Building and Construction Trades Council.*

DECISION OF THE BOARD; November 10, 1978

1. This is a complaint under section 79 of the *Labour Relations Act* alleging a violation of sections 56, 58(c), 59(1), 59(2), 61, 63(1), 63(2), 63(3), 65, 66, 67(1), 123(1), and 123(2) of the Act.

2. This complaint raises important questions relating to the legal status of what are

commonly known as “sub-contracting” clauses. These arrangements, often found in the construction industry, restrict the contracting out of work to contractors having a collective bargaining relationship with a particular trade union or group of trade unions. The complaint challenges not only the legality of such arrangements in the abstract, but also the alleged means by which such an arrangement was obtained in this particular case.

3. Also received by the Board were two related complaints (File Nos. 0554-78-U, 0601-78-U), raising the same issues as this complaint. In order to keep the hearing within manageable limits, the Board ruled that it would deal with this complaint, which had been filed first and, at a later time, would deal with the two related complaints. The Board considers that its decision in this case may provide some guidance to the parties in respect of the two subsequent complaints.

4. At the outset of the hearing of this complaint objection was raised to the wide-ranging particulars supplied in support of the complaint. The Board ruled that it would restrict the particulars to incidents occurring after January 23, 1975, the date that the now-expired agreement between the two respondents came into force. In the Board’s view, only these incidents are of direct relevance to the issue of whether improper means were used to obtain a renewal of this earlier agreement.

5. After the Board had commenced to hear evidence, the Masonry Contractors’ Association (Toronto-Incorporated) [MCAT] sought to intervene in the proceedings. The Board, having taken into account the lateness of this request and the fact that it had already heard some evidence, ruled that it was not prepared to grant the MCAT standing as a party in these proceedings. Having regard, however, to the fact that its decision in this case might have far-reaching implications, the Board ruled that it would permit MCAT to assume a role in the nature of *amicus curiae* in these proceedings. This role would be restricted to arguing the legal issues arising from the evidence, and would not include any active participation in the evidential component of the proceedings.

6. The facts in this complicated case can best be understood against the background of the competing interests at play here. The complainant Bricklayers, Masons Independent Union of Canada, Local 1, is a trade union with a membership of approximately 1,700, of which roughly 1,200 are bricklayers and the other 500 bricklayers’ assistants. Local 1, as it will be called, is not affiliated with any other construction union in Ontario, nor is it affiliated with the respondent building and construction trades council. Local 1 has an agreement with a group of masonry contractors who are members of The Masonry Contractors Association of Toronto Inc. (MCAT). Under this agreement, the members of MCAT are bound to employ only members of Local 1 where the contractors are working within a 40 mile radius from Toronto City Hall. The work jurisdiction of Local 1 is further protected by a restriction in the agreement relating to the sub-contracting of work. This restriction reads as follows:

Any employer who is a Party of this Agreement, desirous of sub-contracting masonry or brick work, shall only sub-contract same to an employer who has a signed Agreement with the union, adopting all of the relevant provisions of this Agreement. Such sub-contract may be for:

- a) Labour only, or

- b) Labour and equipment only, or
- c) Labour and equipment and materials combined.

7. The respondent, The Toronto Building and Construction Trades Council (the Council) is an uncertified council of construction trade unions. A member of this council is Bricklayers, Masons and Tilesetters' Union, Local No. 2, Ontario (affiliated with the Bricklayers, Masons and Plasterers International Union of North America). Local 2, as it will be called, has a membership of roughly 650 bricklayers and marble masons, and does not have as members bricklayers' assistants (who are members of another trade union in the Council). Local 2 has an agreement with a group of contractors called the Toronto Residential Masonry Contractors. Under this agreement the contractors agree to employ only members of Local 2.

8. The work jurisdiction of Local 2 is protected by provisions in agreements between the Council and groups of general contractors relating to the sub-contracting of work. These agreements exist separate and apart from the agreements between Local 2 and the masonry contractors to which it supplies its members. One such agreement is between the respondent Council and the other respondent named in these proceedings, the Metropolitan Toronto Apartment Builders Association (MTABA).

9. The MTABA is an organization of apartment builders in Metropolitan Toronto and vicinity. One of the objects of MTABA is "to regulate relations between Employers and Employees in the Construction Industry and to represent such Employers in Collective Bargaining in any area which is composed in whole or part of all or part of Metropolitan Toronto and Vicinity and to become an accredited or designated Bargaining Agency under 'The Labour Relations Act'." The evidence indicates that the members of MTABA are in essence general contractors who employ sub-contractors to carry out most of the construction work on their projects, and who employ very few construction workmen directly.

10. It is the relationship between MTABA and the Council that appears to lie at the bottom of this complaint. The history of this relationship was provided in some detail by Harold Green, a partner in Greenwin Construction, which was one of the founding members of MTABA and one of its largest members. Green has been an officer of MTABA since its inception in 1969. According to Green, the 1960s saw great labour turbulence in high-rise residential construction as various trade unions sought to obtain collective bargaining rights, especially in respect of concrete forming work. To meet these labour relations problems, the major builders of high-rise residential buildings formed themselves into the MTABA. The MTABA and the Council, on September 20, 1969, entered into an agreement (sometimes referred to as the master agreement), providing certain ground rules for union-management relations in the field of high-rise residential construction. Green referred to the master agreement as "a peace treaty for the industry", and praised the Council for living up to it in every respect.

11. The 1969 master agreement, covering residential construction in Board Area #8, contained provisions to the advantage of both the MTABA and the Council. Article 1.01 restricted the application of the agreement to the on-site construction of apartment buildings, including apartment projects under the Ontario Housing Authority tendered through the normal bid depository system, but then further provided that "where a member owns any

land directly or indirectly, beneficially or otherwise, upon which he intends to construct a commercial, industrial or institutional building, then the terms and conditions of this agreement, and not the terms and conditions of the commercial Unions, shall apply". This latter provision referred to as "the beneficial clause" allowed the members of MTABA to participate in some industrial, commercial, and institutional construction while enjoying the more favourable labour terms of residential construction.

12. Article 3.01 of the agreement, setting out a restriction on the sub-contracting of work, conferred an advantage upon the Council and its members. That restriction provided:

3.01 The members shall only let or sublet work, save and except concrete forming work and masonry work to contractors who are in contractual relationship with Local Unions who are affiliated with the Council and bound by this agreement in accordance with Article 1.02 and 1.03 hereof or have given written notice of their intention to enter into such contractual relationship. This Article must be read subject to and is subject to the terms and provisions of Article 1.03.

Articles 1.02 and 1.03 provided:

1.02 The members and Local Unions listed in Schedules "A" and "B" respectively, agree individually and collectively that the terms and conditions of this agreement shall apply to and are binding upon each of them as evidenced by the signatories hereto, of their respective duly authorized representatives.

1.03 A Local Union affiliated with the Council other than those named in Schedule "B" hereto may request the Council in writing to be included in the group of Local Unions already covered by this agreement, and if the Association and the Council agree that such Local Union has signed collective agreements with a sufficient number of contractors in the particular trade over which the said Local Union has work jurisdiction, then such Local Union may be added to this agreement and be bound by the terms and conditions hereof as if an original party. It is agreed and understood that this Article is not to be interpreted so as to prohibit any member of the Association from engaging, subletting to, or retaining any contractor or sub-contractor or unorganized trade for trades not listed on Schedule "B" or added thereto from time to time.

13. These provisions were somewhat qualified by an addendum to the master agreement, providing that all masonry and concrete forming work arising out of the construction of a commercial, industrial, or institutional building had to be performed only by contractors who were in contractual relationship with trade unions affiliated with the Council. In the case of masonry work the affiliated union was Local 2. At this time, therefore, the members of MTABA when building on a "commercial" basis, were required to use masonry contractors under agreement with Local 2 but, when building on a "residential basis", were not restricted to this group of contractors and were able to use MCAT contractors who had their agreement with Local 1.

14. The 1969 master agreement was renewed by the MTABA and the Council on January 23, 1975. In this renewed agreement Article 1.01 had been substantially altered. While this article generally restricted the agreement to the on-site construction of apartment buildings, it now clarified the term "apartment building" in the following manner:

- i) All Public Housing, Co-operatives, Senior Citizens' and Student Housing;
- ii) a stacked row dwelling, which means a building divided vertically into three or more dwelling units, and horizontally into four or more dwelling units, each having its own private entrance;
- iii) a stacked structure which is four floors or more in height;
- iv) notwithstanding Items i) and ii), a traditional three-storey apartment building, with common corridors, stairwells and parking;
- v) a separate structure which includes space designed to be used for commercial, retail and/or office purposes of not more than 50 per cent (50%) of the gross floor area (excluding parking and recreational facilities);
- vi) those sections of a multi-towered single complex on a common podium which are divided vertically by lines relating directly to commercial and residential sections' then each section shall be built according to its base use.

What happened was that the beneficial clause had disappeared, but in return the Council had recognized the residential agreement as applying to public housing, which was becoming an increasingly important area of construction activity. The subcontracting provision in the 1975 agreement, Article 3.01, remained the same as before, and no substantial changes were made to Articles 1.02 and 1.03.

15. Just prior to the signing of the 1975 agreement, a letter of understanding was provided to Clive Ballentine, the Council's business manager, by Harold Green for MTABA, concerning Article 1.01(i) of the proposed master agreement, dealing with public housing, co-operatives, senior citizens' and student housing. The text of that letter read:

Re: Article 1.01 (i) – Master Agreement

With respect to the above noted, and in view of the long standing practice of using Bricklayers Local #2 for work described in this Article, it is our intention to urge our Members to continue this practice.

While this letter of understanding may not have imposed a strict legal obligation upon MTABA, the evidence before the Board was that it was substantially honoured by the members of MTABA.

16. This account sets the stage for the last set of negotiations between the Council and MTABA. These negotiations commenced in the spring of 1977 and culminated in a

master agreement, dated May 1, 1978. In this agreement, Article 1.03 had been substantially changed, providing for a majority of both contractors and employees, rather than just a majority of contractors as provided by the 1975 agreement, as a condition for inclusion on Schedule "B". More importantly, for the purposes of this case, Local 2 was recognized in Schedule "B" for any projects falling within Article 1.01(i) of the agreement, i.e., public housing, co-operatives, senior citizens', and student housing. According to Karl Mallette, the executive director of MTABA, Local 2 was added to Schedule "B" as the result of the direct negotiations of the parties and not because Local 2 had satisfied the double majority provided in Article 1.03. Mallette testified that the reason for the inclusion of Local 2 on Schedule "B" for 1.01 (i) work was a concern on the part of MTABA that, if it did not do so, it might lose the advantage of the more favourable residential agreement, and end up with the Council agreement for projects falling within the industrial, commercial, and institutional sector of construction.

17. The evidence indicates that the recognition of Local 2 for 1.01(i) work was not granted by MTABA until it had received guarantees from the Council that masonry work already underway at two projects would not be the subject of any action by the Council. One such project was a senior citizens apartment complex being constructed at Queen and Beverley Streets by Belmont Construction Co. Ltd. (an MTABA member). A second project where the use of a Local 1 contractor was causing concern to the Council was one being constructed by George Wimpey Canada Ltd. (an MTABA member) at Mabelle Avenue, Etobicoke.

18. These two ongoing disputes over the use of Local 1 contractors appear to be a factor in the negotiations for a master agreement. The minutes of the MTABA meeting of March 1, 1978, indicate that the Council was prepared to take no action in respect of Belmont in return for the inclusion of Local 2 on Schedule "B" for 1.01(i) work. At that same meeting Ballentine, appearing for the Council, indicated that he would not sign a master agreement which did not recognize Local 2's entitlement to 1.01(i) work. And the minutes of the MTABA meeting of March 31, 1978, indicate that by that time the MTABA had resolved that "a letter to be obtained from Mr. C.A. Ballentine on behalf of the Council to ensure no Council action on projects where the Masonry Contract was let prior to the signing of this proposed MTABA-TB & CTC Agreement and which may be contrary to the interest of this proposed Agreement". On April 4, 1978, the MTABA amended this resolution to read as follows: "a letter to be obtained from Mr. C.A. Ballentine on behalf of the Council to ensure no adverse Council action on the Wimpey project on Maybelle Avenue or on the Belmont project at Queen and Beverley Streets."

19. The apparent response to this resolution was a letter from Ballentine to Mallette of the MTABA, dated April 14, 1978. The text of this letter reads as follows:

In consideration of Local #2 Ontario I.U.B.A.C. being added to Schedule "B" for work described under Article 1 – 1.01 (i), and the Metropolitan Toronto Apartment Builders Association and the Toronto Building and Construction Trades Council is consummated; it is therefore agreed that masonry work commenced on the following projects will be completed without harassment by the Council or its affiliated unions:

- 1) George Wimpey Canada Limited
Location: Mabelle Avenue, Etobiocke

- 2) Belmont Construction Company Limited
Location: Queen Street and Beverley Street, Toronto.

Trusting the foregoing is satisfactory, I remain,

20. This assurance appears to have satisfied the MTABA as the draft MTABA-Council agreement was ratified by it at a special general membership meeting held on April 17, 1978. The minutes of that meeting indicate that the ratification was based on the following understandings:

- a) the Agreement is to remain in force until 30th April, 1982;
- b) Bricklayers, Masons & Tilersetters' Union, Local 2, Ontario, of I.U.B.A.C. (Residential Section) be added to Schedule "B" for work described in Article 1.01(i);
- c) the Amendment in b) above is on condition that the Residential Rates and Conditions shall apply and that the segmentation of Article 1.01 shall only apply to Masonry;
- d) the Association agrees to bear any Legal costs which may result from any Legal action alleging that the inclusion of the Clause recognizing Bricklayers' Local 2 for work under Article 1.01 (i) was improper.

This ratified draft agreement, dated May 1, 1978, was subsequently signed by Harold Green and R.W. Pugh for the MTABA, and was delivered to the Council after the hearings into this matter had commenced. According to Green, the 1978 master agreement is now regarded by MTABA and its members as being a binding document.

21. The complainant sought to establish that certain alleged incidents of unlawful picketing were related to MTABA's decision to recognize Local 2 for 1.01(i) work. As indicated earlier, the Board ruled that only those incidents occurring after the commencement of the 1975 agreement could be considered at all relevant to the recognition of Local 2 in the 1978 master agreement, which is the gist of this complaint. The particular incidents alleged to have occurred after January 23, 1975, will now be set out in detail.

22. The first such incident was alleged to have occurred at Trenton, Ontario, in the summer of 1975 during the construction of an 84-suite senior citizens apartment building. The general contractor, Taro Properties Incorporated, which was not a member of MTABA, had sub-contracted the masonry work to Metric Masonry, a member of MCAT which employed members of Local 1. Once the masonry work was underway, pickets appeared on the job with signs that demanded the employment of local labour. Metric was unable to complete the job because the drivers of the trucks bringing in masonry supplies would not cross the picket line, and the general contractor was unable to obtain the removal of the picket line. Metric was then informed in a letter from Taro, dated August 18, 1975, that the masonry contract was being terminated because of "a requirement that all masonry contractors employed by Taro Properties Inc." be associated with the Ontario Provincial Conference, Affiliated with the Bricklayers', Masons' and Plasterers' International Union.

23. This evidence clearly establishes that picketing occurred and that, as a result of this picketing, Metric was unable to finish its job. On the other hand, there is no evidence to indicate that the respondent Council was behind the picketing, or that it had anything to do with the MTABA-Council master agreement. At best, there is some circumstantial evidence from which to infer that the Ontario Provincial Conference of the Bricklayers', Masons' and Plasterers' Union of America was attempting to enforce, through the use of pickets, a sub-contracting clause in its own agreement.

24. A second incident relied upon by the complainant was one alleged to have occurred at a senior citizens home being constructed by Cadillac-Fairview Corp. Ltd. (an MTABA member) at Victoria Park Avenue and O'Connor Drive. The masonry work for that project had been let to Zachary Du Vuono Masonry Ltd., a member of MCAT and an employer of members of Local 1. After Du Vuono commenced work on the project, pickets appeared with the result that only the members of Local 1 continued to work on the job. The following day, however, the pickets did not appear, and Du Vuono was able to complete the job. Kenneth Brocklehurst, an executive of Cadillac-Fairview, testified that the contract had been given mistakenly to a Local 1 contractor in contravention of the letter of understanding recognizing Local 2 for 1.01(i) work. According to Brocklehurst, after the picket line appeared he met with Ballentine and it was agreed that Cadillac-Fairview would abide by the letter of understanding in the future but that it could complete the particular project with the Local 1 masonry contractor. The following day, Brocklehurst wrote to Ballentine in the following terms:

Re: Article 1.01(i)

Further to our meeting of yesterday's date, this is to confirm our agreement that on all future public housing projects carried out by this company as defined in article 1.01(i) of the master agreement dated 23 January 1975, namely, all public housing co-operative senior citizen and student housing tenders for masonry will be called *only* from contractors who are in contractual relations with bricklayers local no. 2.

25. Zachary Du Vuono testified as to a second incident involving his company. Du Vuono had made arrangements with McNamara Engineering Ltd. to do the masonry work at a senior citizens housing project at Broadview and Danforth Avenues. According to Du Vuono, he was led to believe that his tender was accepted, and a formal contract would be forthcoming. In March of 1977, however, he was informed that his company would not be getting the job. Subsequently, McNamara received permission from the Metropolitan Toronto Housing Co. Ltd. to substitute Village Contractors, a Local 2 contractor, for Du Vuono's company. While this incident appears to shed some light on the economic consequences of the competition for masonry work at public housing projects between the two bricklayers' unions, it does not appear to bear directly on the negotiations of the MTABA-Council agreement. McNamara Engineering is not a member of the MTABA and, moreover, this incident does not establish that any illegal pressure was brought to bear to bring about the change of masonry contractors.

26. A somewhat more recent incident does appear to relate more closely to the relationship between MTABA and the Council. Parkline Construction Ltd. was in the process of constructing a high-rise condominium project at Rathburn Road and Highway 10 in

Mississauga in the fall of 1977. On November 14, 1977, two pickets appeared at the site when the members of Local 1 were performing masonry work. Only the bricklayers continued to work once the pickets appeared. Sam Granata, the president of Parkline, testified that the pickets did not explain the reasons for their activity. Later, he was told by a person whom he believed to be a business agent from the Council to get in touch with Ballentine. Granata met with Ballentine who denied any knowledge of the picket line. Ballentine then indicated that Granata could sign directly with the Council or join the MTABA, the latter course allowing him to continue to use Local 1. Subsequently, he contacted Mallette, joined MTABA, and signed the master agreement. Parkline was then able to finish the project without further picketing incidents.

27. One final incident occurred after the MTABA had ratified the 1978 master agreement. On May 29 and 30, 1978, pickets appeared at the Copernicus Lodge Senior Citizens' Building being constructed at the north-east corner of Roncesvalles Avenue. The masonry contractor working on the site at that time was Venice Masonry Contractors Ltd., which employed members of Local 1. Apparently, the Local 1 members continued to work in the presence of the picket line but the other construction trades did not. According to Otello Ungaro, a Local 1 business agent, the picket signs carried the message that non-union labour was being used on the project. When Ungaro questioned the pickets about their purpose, he was told to phone a number which turned out to be the Council's phone number. While the incident illustrates that hit-and-run picketing does occur in the construction industry, it does not appear to relate directly to the MTABA-Council relationship.

28. The first question with which the Board must deal is whether a sub-contracting clause standing by itself contravenes the provisions of the *Labour Relations Act*. Counsel for the complainant, supported by counsel for the MCAT, submitted that the master agreement between the MTABA and the Council was not a collective agreement so that the sub-contracting provision must be regarded as falling outside the normal legal immunity provided to union security arrangements found in collective agreements. Standing alone, according to this argument, this sub-contracting clause amounted to an unlawful restraint of trade and was contrary to those provisions of the *Labour Relations Act* guaranteeing to employees the freedom to join the trade union of their choice.

29. Counsel was careful to point out, however, that he was not impugning the validity of all sub-contracting clauses, but only the validity of those that fall outside of collective agreements and that allow unions which have leverage over general contractors to gain an advantage in the allocation of work. The effect of this arrangement, according to counsel, is that work is directed away from the union which does not have such leverage, effectively depriving employees of the right to belong to that union. Given this result, counsel asked the Board to conclude that the sub-contracting provision found in the master agreement violated sections 56, 58(c), 59, and 61 of the Act.

30. In response to these submissions, counsel for the respondent Council raised a number of arguments relating to the scope of sections 56, 58(a), 59, and 61, including the argument that an uncertified council of trade unions could not be bound by these sections. The Board considers that it should deal with the broader arguments raised by the respondent Council, and only deal with this more narrow argument if it proves to be necessary. According to the respondent's counsel, section 38 of the Act simply does not deal with sub-contracting clauses, regardless of whether they are included within a collective agreement.

Accordingly, their legality does not depend upon whether they are included within a collective agreement, and must be determined by reference to existing jurisprudence. Both Board decisions and judicial decisions, according to counsel, recognize the sub-contracting provisions as a legitimate means by which a trade union can assert its claim for particular work. While the operation of these provisions may affect other trade unions, the result can only be characterized as a jurisdictional dispute involving competing claims for the same work from rival unions. The sub-contracting clause, according to counsel, does not interfere with the right of employees to join the union of their choice, but merely serves to protect the work jurisdiction of the union which is the beneficiary of such a clause.

31. A first step to the resolution of the issues raised by these arguments is an examination of the scope of section 38. Section 38(1)(a) of the Act provides that certain forms of union security arrangements contained in collective agreements are permitted regardless of any provision in the Act that might be read as restricting their use. Section 38(1) reads:

38. – (1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;
- (b) for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;
- (c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.

32. Does this section of the Act provide any immunity for sub-contracting clauses? As a matter of interpretation, the words of section 38 do not appear capable of being stretched to cover sub-contracting provisions. This kind of clause does not require as a condition of employment that a person be a member of a trade union, or the payment of dues or contributions to any union, but that any work contracted-out be given only to an employer having a collective bargaining relationship with a particular union. What is being restricted is the employer's choice of sub-contractor, and not the employee's choice of trade union. While it might be argued that sub-contracting provisions do have some effect on an employee's choice of trade union, any such effect would be indirect at most, as there is no certainty that employees will change unions in order to increase their opportunities to acquire work.

33. Sub-contracting provisions, as well, do not appear to fit within the other kind of clause contemplated by section 38(1)(a) – provisions granting a preference of employment

to members of a trade union. This kind of clause goes much further than the usual collective agreement clause that provides a preference of employment to union members. By completely prohibiting the contracting-out of work to unorganized employees, or employees organized by another union, the sub-contracting clause does far more than to create a preference of employment for members of a particular union. The effect of this kind of clause is to give any work contracted-out to one group of contractors, those having a bargaining relationship with the particular union, and to exclude all other contractors from that work. In essence, the sub-contracting clause creates a preference for a particular group of contractors, and not just a preference of employment to members of a trade union.

34. Our conclusion is that the language of section 38(1)(a) cannot be read as covering any form of sub-contracting provision. Sub-contracting provisions, regardless of whether they form part of a collective agreement or stand outside a collective agreement, cannot lay claim to the legal immunity provided in section 38(1)(a) to union shop clauses. Their validity under the *Labour Relations Act*, therefore, must be determined without reference to the statutory protection afforded such union security provisions as the union shop or the dues shop, and the Board need not address the question of whether the MTABA-Council agreement is a collective agreement under the *Labour Relations Act*.

35. In arriving at this conclusion the Board recognizes that, in the context of the construction industry, a sub-contracting clause may serve a purpose parallel to that of the union shop, or union dues provision, in the industrial setting. Both types of clauses can be construed as attempts by trade unions to enhance their strength as collective entities. At this point, however, the comparison ends. Union security in the industrial setting appears to refer primarily to provisions, such as union shop clauses and dues shop clauses, which serve to ensure that all members of the bargaining unit contribute to the financial support of the bargaining agent. In the construction industry, on the other hand, union security appears to be more related to contractual provisions recognizing the union's claim to particular work, i.e., the sub-contracting provisions. These provisions appear to be primarily directed at preserving a union's work jurisdiction so that it can continue to provide work for its members. The construction union in so doing is then able to maintain its own strength as a collective entity.

36. The object of a sub-contracting clause is to preserve the work jurisdiction of the trade union which is the beneficiary of the clause. While it may be that a sub-contracting clause, such as the one contained in the MTABA-Council agreement, has a much greater impact than the one contained in the agreement between Local 1 and the MCAT, both share a common purpose – to ensure that any work contracted-out is performed only by members of the union which has obtained the sub-contracting clause. In both cases, moreover, this purpose is carried out by the placing of restraints upon the tendering of sub-contracts, restraints that prevent the members of other unions from gaining access to the work. In the light of these considerations it would not be consistent for the Board to distinguish between forms of sub-contracting arrangements. In the Board's view, all such arrangements fall outside the scope of section 38(1)(a), and must find their legal justification elsewhere in the *Labour Relations Act*. If the sub-contracting provision in the MTABA-Council agreement is illegal then so must be the sub-contracting clause in the Local 1-MCAT agreement.

37. The question for the Board to decide is whether the sub-contracting provision in the abstract violates any provision of the *Labour Relations Act*. This appears to be the first

occasion when this question has been put directly to the Board, although on other occasions the Board has had to deal with sub-contracting provisions. These previous decisions indicate an implicit recognition by the Board of the legal validity of sub-contracting arrangements. In cases such as *Beer Precast Concrete Ltd.*, [1969] OLRB Rep. Jan. 1108, *Beer Precast Concrete Ltd.*, [1970] OLRB Rep. May 224, *Ellis-Don Ltd.*, [1971] OLRB Rep. Sept. 620, *Abe Dick Masonry Ltd.*, [1972] OLRB Rep. Jan. 74, *Northdown Drywall and Construction Ltd.*, [1972] OLRB Rep. Jun. 666, *Acme Lathing Co. Ltd.*, [1972] OLRB Rep. Mar. 215, *Donaldson Barron Ltd.*, [1976] OLRB Rep. Dec. 793, the Board was faced with work jurisdiction problems created by sub-contracting provisions and the issues of whether the Board should deal with such problems by applying the jurisdictional dispute procedures now found in section 81 of the Act. While the Board did not apply its jurisdictional disputes procedure in all of these cases, it is clear that the Board regarded the sub-contracting provision in each of these cases as being a legitimate attempt by a union to assert its jurisdiction over particular work. In *Napev Construction Ltd. and Vepan Leaseholds Ltd.*, [1976] OLRB Rep. Mar. 709, moreover, the Board went even further in recognizing the legitimacy of the sub-contracting clause by making it clear that the sub-contracting provisions in a collective agreement could be enforced by a referral under section 112a of the Act. These decisions leave no doubt that this Board in previous decisions has implicitly recognized the legality of the sub-contracting arrangement.

38. This Board's recognition of the legitimacy of sub-contracting clauses is not inconsistent with the manner in which these provisions have been treated in other Canadian jurisdictions. In *R.M. Hardy and Associates Ltd.*, [1977] 2 Can. LRBR 357, the British Columbia Board, speaking to both the sub-contracting clause and the non-affiliation clause (which is not an issue in this case), made it clear that these types of clauses did not amount to illegal coercion under the *Labour Code* of British Columbia. This decision was entirely consistent with an earlier decision in the British Columbia Court of Appeal. In *Canadian Ironworkers Union No. 1 v. International Association of Bridge, Structural and Ornamental Ironworkers Union, Local No. 97* (1970), 70 CLLC, ¶14,053 (B.C.C.A.) all three justices came to the conclusion that the sub-contracting clause did not violate any collective bargaining statute, a view which appears to have been accepted by the Supreme Court of Canada when this decision was appealed (see [1972] S.C.R. 295). This conclusion was later followed in *Canadian Pacific Railway Company and Brotherhood of Railway, Airline and Steamship Workers, Freight Handlers, Express and Station Employees v. Building Material, Construction and Fuel Truck Drivers Union, Local 213 of International Brotherhood of Teamsters*, [1975] 5 W.W.R. 329 (B.C.C.A.). These decisions appear to recognize that the primary purpose of the sub-contracting provision is to protect the work jurisdiction of the union which has obtained such a clause, a purpose not in conflict with any collective bargaining legislation.

39. This Board concurs with the view that the primary purpose of the sub-contracting clause is to protect a union's claim to a particular work jurisdiction. Can it be said, then, that such provisions interfere with an employee's right to join a trade union of his choice, as protected by sections 58(c) and 61 of the Act? Although employees may be tempted to join a trade union which can provide them with work, this consideration is a recognized fact of life in the construction industry where trade unions have some control over the allocation of work through their hiring halls. The availability of work through a trade union will always operate as an inducement to employees to join a particular union, regardless of the presence of a sub-contracting arrangement. This kind of inducement, therefore, cannot constitute the kind of conduct contemplated by either section 58(c) or section 61 of the Act.

40. Nor can it be said that the sub-contracting clause interferes with another union's bargaining rights contrary to section 56 and 59 of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the *Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 and 59 of the Act are intended to protect bargaining rights only, and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 of the Act for the resolution of jurisdictional disputes.

41. The MCAT attacked the sub-contracting clause on a somewhat different ground, arguing that the clause was illegal because it restricted the tendering procedure. According to the MCAT, it was particularly unfair that its members were being excluded from access to projects being financed by public money. While this concern of MCAT is quite understandable, it should be made clear that the supervision of tendering procedures is well beyond the jurisdiction of this tribunal. Our jurisdiction is to simply determine whether sub-contracting provisions, as such, violate any provision in the *Labour Relations Act*. The answer to this question is clearly no.

42. Our conclusion that sub-contracting clauses are not prohibited by the *Labour Relations Act* does not mean that such clauses establish an exclusive claim to the work in question. The facts of this case indicate that changing economic conditions have brought the two bricklayers unions into conflict over their respective work jurisdictions. Whereas a few years ago the work jurisdictions of the two unions were more insulated from each other, Local 1 being in what was primarily private residential construction and Local 2 being in primarily industrial, commercial and institutional construction of a non-residential nature, the recent emphasis upon the construction of public housing appears to have caused some overlap in their respective work jurisdictions. This apparent overlap of jurisdiction gives rise to the possibility of an application under section 81 to resolve the competing jurisdictional claims.

43. The Board has made it clear that the enforcement of a sub-contracting clause against a general contractor can be interpreted as a requirement that an employer assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class within the meaning of section 81(1) of the *Labour Relations Act*. See *Beer Precaset Concrete Limited*, [1969] OLRB Rep. Jan. 1108, *Donaldson Barron Ltd.*, OLRB Rep. Dec. 793 and, for a general discussion of what constitutes a jurisdictional dispute, *Eamon Riggs Limited*, [1978] OLRB Rep. Mar. 228. Given the Board's decisions that an attempt to enforce a sub-contracting clause against a general contractor can set in motion the section 81 procedure, it would appear to follow that the natural operation of a sub-contracting clause can also give rise to the same legal result. In other words, once a contract is let pursuant to a sub-contracting clause, then at that point it can be said that a trade union is requiring an employer

to assign particular work to persons in a particular trade union rather than to some other trade union, giving access to the jurisdictional dispute procedures under section 81. The jurisdictional dispute only materialises when the contract is let, as it is at that point that there comes into existence a particular work assignment flowing from the sub-contracting provision.

44. Once a jurisdictional dispute actually materialises, the sub-contracting clause cannot be the only factor taken into account by the Board when determining which union has the better claim to the work. As the Board indicated in *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528, collective bargaining relationships are one factor to be considered when resolving a jurisdictional dispute, but such other factors as the skill and training of the employees, economy and efficiency, the employer's practice, and the area practice are also to be taken into account. Thus, while a sub-contracting clause may assert a claim to a particular work jurisdiction, it does not necessarily establish an exclusive claim to this work.

45. To summarize, our conclusion is that a sub-contracting provision standing alone does not violate any provision in the *Labour Relations Act*, since it is in essence a device for protecting a union's work jurisdiction. Sub-contracting clauses, therefore, are legal arrangements under the Act and, if they form part of a collective agreement, are enforceable under section 112a of the *Labour Relations Act*. The enforcement, or operation of these clauses, however, may give rise to a jurisdictional dispute, requiring resolution through the procedures found in section 81 of the Act. If these procedures are invoked, then the existence of a sub-contracting clause is only one factor to be considered by the Board when resolving the jurisdictional dispute.

46. The second question before the Board is whether this particular sub-contracting arrangement has been rendered unlawful by the means through which it was obtained. Counsel for the complainant submitted that the sub-contracting clause was obtained as the result of a pattern of unlawful picketing and coercion contrary to sections 63, 65, 66, 67 of the Act and was, therefore, illegal. The complainant, in addition, asked the Board for an order restraining any such illegal activities in the future.

47. After having considered all of the evidence, the Board is unable to conclude that the inclusion of Local 2 on Schedule "B" of the MTABA-Council agreement was obtained by the use of any illegal pressures. There is no doubt that this matter was a contentious issue for both the MTABA and the Council, and that the concession was made with some reluctance on the part of MTABA. It is also clear from the evidence, however, that the concession was made by MTABA in return for the continuance of the favourable residential agreement, and not because of any illegal pressure. It cannot be said, therefore, that the sub-contracting provision in the 1978 agreement is in any way tainted by the incidents which the complainant sought to prove.

48. Even though these incidents do not relate to the sub-contracting provisions in the MTABA-Council agreement, the Board wishes to make some comment upon them. While there is proof that picketing incidents did occur and that they gave rise to work stoppages, the evidence does not establish to the satisfaction of the Board that these incidents were authorized by the Council or its officers. The evidence of these incidents was somewhat scanty, particularly in respect of those incidents that occurred some time ago. If persons wish remedial relief in respect of this kind of activity, as a practical matter, they must bring an appli-

cation to the Board when the events are fresh and the Board is better able to assess the evidence. At that point, if illegal activity is established, the Board can issue an order restraining this illegal conduct, and prevent any further damage that might result from it.

49. Accordingly, for the reasons given above, the Board dismisses this complaint.

0665-78-M Nortex Products Company (Formerly Division of Superpack Corporation Limited), (Employer), v. The United Steelworkers of America, for itself and on behalf of Local Union 6269, (Trade Union).

Collective Agreement – Reference – Timeliness – Collective agreement providing that it would automatically continue if notice not given – Notice given in accordance with Act but not agreement – Agreement provisions take precedence.

BEFORE: G. Gail Brent, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *S.C. Bernardo and E. Kellow for the Employer, Paul Cavalluzzo, Rob Nicol and Lorne Brown for the Trade Union.*

DECISION OF THE BOARD; November 29, 1978

1. The Minister has referred to the Board, pursuant to Section 96 of the Act, the question as to whether the Minister has authority under the Act to appoint a conciliation officer.

2. On July 31, 1978 a decision was issued by the Board which reads as follows:

“Having regard to the agreement of the parties, the Board hereby consents to adjourn this application *sine die* for a period not exceeding one year. Unless within that time the parties request that the Board proceed with the matter, it will be terminated.”

The matter was subsequently put down for hearing, apparently at the request of the parties, within one year of that date.

3. The questions the Board must answer are:

(1) Was notice given to the employer, pursuant to section 45(1) of the Act, of the union's desire to bargain for a new collective agreement?

(2) Was proper notice given to the employer, pursuant to the terms of the collective agreement, of the union's desire to bargain for a new collective agreement, thereby satisfying section 45(2) of the Act?

4. On February 15, 1978 the union local had a general meeting which was called to discuss proposals for a new collective agreement according to the posted notice (Exhibit #2). Four notices were posted in the plant. Mr. Kellow, the president and general manager of the employer, testified that he was aware of the notice and its contents.

5. The Board accepts that, after the meeting of February 15th, Mr. Kellow and Mr. Brown, the president of the local, had a casual conversation in passing wherein Mr. Kellow inquired if the attendance at the meeting was good, and was informed that the meeting had discussed contract proposals.

6. After the February 15th meeting, the members of the union bargaining committee met with Mr. Syl MacNeil, who was then the international representative serving the local, to formulate contract proposals and draft a letter to the employer giving notice of intent to bargain for a new collective agreement.

7. Mr. Brown testified that some time around the beginning of March he passed Mr. Kellow in the hall at the plant and that Mr. Kellow remarked that he had not yet received any notice to bargain from the union. Mr. Brown testified that he said that the letter was in the mail. Mr. Kellow testified that the conversation did not take place.

8. It is agreed, though, that no written notice was sent or received prior to March 31, 1978.

9. On March 31, 1978 Mr. Brown and Mr. MacNeil attended a meeting in Mr. Kellow's office to discuss grievances. At that meeting Mr. MacNeil appeared surprised when told that no letter containing notice to bargain had been received by the employer.

10. That day Mr. MacNeil apparently returned to his office and drafted a letter, Exhibit #4, which was a covering letter for what purported to be a copy of the written notice to bargain (Exhibit #5) dated March 17, 1978. The union has never sought to claim before this Board that the letter dated March 17th was sent before March 31st. The testimony of Mr. Nicol, the former and present international representative, was that when he learned that this had been done, he was very upset with Mr. MacNeil and expressed the view that the letter should never be sent.

11. Mr. Nicol also testified that in all meetings with Mr. Kellow after March 31st the union never took the position that oral notice had been given to the employer. Mr. Nicol's approach to Mr. Kellow throughout appeared to have been an attempt to persuade Mr. Kellow to negotiate with the union despite the fact that notice had not been given within the time limits of the collective agreement.

12. The employer's position throughout is that no notice to bargain was ever given and that, by virtue of the terms of the collective agreement, there was an automatic renewal of the terms of the collective agreement for another year.

13. The only other significant point to consider concerns a conversation between Mr. Bradbury, the manufacturing manager, and Mr. Brown. This conversation took place on March 17th in the presence of Mr. Ernie Napolitano. According to Mr. Brown and Mr. Napolitano, Mr. Bradbury said to Mr. Brown that "the letter from the union had arrived." Mr.

Brown and Mr. Napolitano both understood that the letter had not been opened because Mr. Kellow was away on vacation. Mr. Brown knew that a letter (Exhibit #3) had been sent to Mr. Kellow by Mr. Nicol concerning the insurance coverage. At no time did he inquire whether that letter or any other letter from the union had arrived.

14. Mr. Bradbury's account of the conversation was slightly different. He said that he told Mr. Brown that the letter which arrived while Mr. Kellow was on vacation was the letter concerning the insurance problems.

15. It would appear that, at all material times, both the employer and the union were expecting that Mr. Kellow would receive a letter containing notice of the union's intent to bargain for a new contract, and that this notice would be received within the time limits set out in the collective agreement. The Board accepts that under the circumstances it would have been "very naive" (Mr. Kellow's words) of the employer not to expect that the union was going to want to bargain for a new collective agreement. The expectation was such that Mr. Kellow left instructions with Mr. Bradbury to watch the mail for any letters from the union while Mr. Kellow was on vacation.

16. As stated earlier, the Board must answer the questions set out in paragraph 3. In order to do this the Board will have to deal with section 45(1) and (2) of the Act and Article 27 of the collective agreement. These are set out below:

"45. (1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.

ARTICLE XXVII – TERMINATION

27.01 This Agreement shall become effective on the 22nd day of April, 1977, and shall remain in full force and effect until the 21st day of April, 1978, and from year to year thereafter unless notice of intention to terminate or amend this Agreement is given by either party not more than sixty days and not less than thirty days before the termination of said Agreement."

17. Counsel for the union admitted to the Board that in order to decide that proper notice had been given according to section 45(1) of the Act that the Board would have to make a decision which was directly contrary to its decision in *Textile Workers Union of America, C.I.O.-C.L.C. and Hield Brothers Limited of Kingston*, (1957), 57 C.L.L.C. 1638 which has been consistently followed since 1957. Counsel for the union also was frank with the Board in admitting that the language used in the collective agreement between these parties, and the language used in *Hield Brothers* (supra) is virtually identical and that the statutory provisions in both cases are also substantially identical.

18. The *Hield Brothers* case held that in order to determine when an agreement “ceases to operate” within the meaning of section 45(1) the Board must, naturally enough, look to the termination clause of the collective agreement. It then went on to interpret the termination clause as being one which called for the continued operation of the collective agreement for successive one year periods unless one of the parties took steps to terminate the collective agreement by giving notice within the proper period of time prior to an anniversary date.

19. While the Board is not bound by the doctrine of stare decisis, it must consider that employers and unions are mindful of Board decisions and that they tend to deal with one another keeping Board decisions in mind. It is therefore our view that long-established Board positions ought to be regarded with some weight unless cogent arguments can be presented to depart from those positions.

20. In the case before us the parties negotiated a termination clause to their collective agreement which is virtually identical to the clause considered by the Board in *Hield Brothers*. It would seem that the reasonable conclusion is that they intended the termination clause in their agreement to be interpreted in the same way as the clause considered in *Hield Brothers*.

21. Even if that conclusion is not a reasonable one to draw, the distinction drawn in *Hield Brothers* and subsequent cases between collective agreements which continue in existence until terminated by the act of one of the parties and collective agreements which cease to operate and are then revived unless notice is given is one which, although admittedly technical, is well-established in labour relations in this province. In this case, the Board will not discard that distinction.

22. It is therefore our conclusion that written notice was not given within 90 days “before the collective agreement ceases to operate” because the collective agreement would not automatically cease to operate on April 21, 1978.

23. The next question to be considered is whether notice was given “not more than sixty days and not less than thirty days” before April 21, 1978 as required by the termination clause. It is agreed that the period in question would, in this case, run from February 20, 1978 to March 22, 1978.

24. The Board agrees that the collective agreement does not require “notice of intention to terminate or amend this Agreement” to be in writing. It is further agreed that no written notice was given in the period in question. Therefore, the only thing for the Board to consider is whether there was oral notice given in the period.

25. None of the union witnesses said that they intended any of their conversations with Mr. Kellow or Mr. Bradbury to be notice to bargain. All of the witnesses were aware that bargaining would likely take place and that the union would want to bargain for a new collective agreement. The Board has been asked by the union to equate Mr. Brown’s alleged conversation with Mr. Kellow at the beginning of March with the situation in *The Toronto and District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America v. Barwood Sales (Ontario) Limited (Scarborough)*, [1961] OLRB Rep. Nov. 292. In that case the applicant union telephoned the respondent and the Board report shows the following account of the conversation:

"... the applicant advised that the collective agreement was ready for renewal and it would 'like to get with it.' The applicant then asked whether written notice of its desire to bargain should be sent to the respondent in Toronto or to the respondent's head office in Montreal."

26. In the case before us the exchange between Mr. Kellow and Mr. Brown early in March is the only conversation which falls within the time period which the parties have agreed is appropriate for the giving of notice. Mr. Kellow has denied that that conversation took place. Assuming that the conversation did take place, can it be construed as notice to bargain? In *Barwood* (supra) the Board was considering a situation where the applicant expressly stated the collective agreement was to be terminated and that it wanted to begin to negotiate with the respondent. Here, at most, we have the expression of the normal expectation of an employer that he would receive notice from the union together with an assurance that such notice would soon be forthcoming. Mr. Brown said that he did not consider that he was giving notice to Mr. Kellow, and from the conversation, as he reported it, it would seem reasonable to conclude that he was assuring Mr. Kellow that the union intended to give notice but that the notice would be coming from Cecil Street.

27. It is clear that Mr. Kellow knew many things concerning the union's intentions. He knew that the membership of the local had been discussing proposals; he knew that the union would likely want to negotiate a new collective agreement; he even knew that the union was going to send him notice to that effect. The state of Mr. Kellow's knowledge of these affairs is not really germane to the issue. The collective agreement, which the parties themselves negotiated, requires that one of the parties take appropriate action to expressly inform the other of its "intention to terminate or amend" the collective agreement within a specified period of time. Neither of the parties here took such a step.

28. It must therefore be our conclusion and advice to the Minister that a conciliation officer cannot be appointed here as there is an existing collective agreement unless and until notice is given between sixty and thirty days of April 21, 1979. This conclusion is reached with a considerable feeling of regret that the union has had to pay such a high price for what appears to be the negligence of its international representative of that time. The employer has made a decision to rely on its rights contained in the collective agreement and the Act, and the Board must respect those rights – especially when they have been conferred on the employer by the agreement of the parties.

CONCURRING DECISION OF BOARD MEMBER O. HODGES:

1. I have serious doubts as to the correctness of the Board's decision in *Hield*. In my view that decision sanctions an agreement for an indefinite term, since the actual term of operation of the agreement will depend upon the giving of notice – an act which cannot be determined by reference to the fact of the agreement. In addition it appears to permit a postponement of the "open period" – which will either occur or not, depending upon whether notice is given. It seems to me that the *Hield* principles should be re-examined, but until such re-examination occurs, I must reluctantly agree with the majority decision, even though the practical considerations of collective bargaining are not well served by this finding.

2. The Preamble to the Ontario Labour Relations Act states:

“Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:”

The rigid position held by the employer cannot be seen as “encouraging the practice and procedure of collective bargaining.” Labour relations are human relations and the circumstances present in this case are clearly the result of a human error quite rare in my experience.

3. The employer should not be surprised if in the next round of bargaining for renewal of the collective agreement a very determined effort to “catch up” is made by the trade union as a consequence of the employees being involuntarily bound to an obsolete agreement for a further year.

4. Unusual though the “automatic renewal” problem experienced here is, it is evident that trade unions should review the termination provisions of collective agreements and eliminate this hazard by providing for automatic termination at the end of the agreed upon term. S.70 of the Act would then prevail to continue the terms and conditions of the collective agreement during bargaining for renewal.

0650-78-R Windsor Motion Picture Projectionists Union Local 580 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Applicant), v. Canadian Odeon Theatres Ltd., (Respondent), v. **The Odeon Theatres (Canada) Limited**, (Intervener), v. Employees, (Objectors).

Sale of a Business – Successor Status – Employer’s business acquired via share purchase by second company – Union seeking to extend bargaining rights to employees of the purchasing company – Application dismissed

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members E. Boyer and E. C. Went.

APPEARANCES: *Lawrence Stieh for the applicant; B. R. Baldwin, and R. G. Yeoman for the respondent and the intervener; Peter Panzica and Julian Manko for the objectors.*

DECISION OF THE BOARD; November 1, 1978

1. The applicant has applied to the Board under section 55 of The Labour Relations Act.

2. The facts giving rise to this application are not in dispute. The applicant is a trade union which represents certain motion picture projectionists in South Western Ontario. The applicant has for some years had a bargaining relationship with the intervener. The intervener operates the Odeon Theatre in Windsor, and it is agreed by all parties that the projectionists working at this theatre are covered by a collective agreement entered into between the applicant and the intervener on March 3, 1978. This application concerns not the Odeon Theatre in Windsor, Ontario but rather two drive-in theatres in the Windsor area, namely The Windsor Drive-in and The Skyway Drive-in. Until January 1, 1977 these two drive-in theatres were operated by Dydzak Drive-In theatres Limited. The applicant had no bargaining rights with respect to employees of Dydzak at either of the two drive-ins. On January 1, 1977 the two drive-ins were leased and began to be operated by Canadian Theatres Group Limited. The applicant did not have any bargaining rights for Windsor area employees of Canadian Theatres Group Limited.

3. On or about December 30, 1977 Canadian Theatres Group Limited acquired from the Rank Organization, by way of a series of complex financial transactions, the shares of Odeon Theatres (Canada) Limited, the intervener in this matter. On or about February 7, 1978 Canadian Theatres Group Limited changed its name to Canadian Odeon Theatres Ltd. (i.e. the respondent). To date the respondent and the intervener have continued to operate as separate entities and at least in the Windsor area there has been no intermingling of employees of the two firms. The current situation then, is that both the respondent and the intervener are operating theatres in the Windsor area. The intervener operates the Odeon Theatre where it acknowledges the applicant's bargaining rights. The respondent operates the two drive-in theatres, where the applicant has never held bargaining rights.

4. The applicant is seeking a declaration under section 55 that the respondent is bound to the aforementioned collective agreement between the applicant and the intervener and that the collective agreement applies to employees at the two drive-ins.

5. The purpose of section 55 is clearly to preserve existing bargaining rights which might otherwise terminate on the sale of a business. The only "sale" which occurred in this case involved the acquisition of the shares of the intervener by the respondent prior to the respondent's change of name. It is agreed by all parties that the applicant's bargaining rights with respect to employees of the intervener continued subsequent to this sale. However, the applicant is seeking by way of this application to obtain bargaining rights for employees of the respondent, notwithstanding that it has not previously represented these employees and that there has been no intermingling of employees of the two companies. It is our view that section 55 simply was not meant to, nor does it have the effect of, extending bargaining rights in this manner. Accordingly we are of the view that this application cannot succeed.

6. As a final matter, reference should be made to a collective agreement entered into by the applicant and the respondent on July 6, 1978. At the hearing the applicant's representative contended that although the collective agreement refers specifically only to projectionists employed at a drive-in in Chatham, the geographic scope of the collective agreement is in fact wide enough to encompass the two Windsor area drive-in theatres, and accordingly this agreement should be taken into account by the Board in reaching its determination with respect to this application. We are, however, unable to accept this proposition. The collective agreement being referred to was entered into long after the respondent

acquired control of the intervener and in the circumstances of this case is not relevant to a section 55 determination. If the applicant is of the view that the respondent through the collective agreement has recognized the applicant as bargaining agent for employees at its Windsor area drive-ins that is a matter which should be dealt with pursuant to the grievance-arbitration procedures provided for in the collective agreement itself.

7. The application is hereby dismissed.

0475-78-R . United Steelworkers of America, (Applicant), v. **Radio Shack**, (Respondent), v. Group of Employees, (Objectors).

Certification – Charges – Membership Evidence – Petition – Allegation of impropriety in solicitation of membership evidence rejected – Petition rejected

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members B. Lee and W. Gibson.

APPEARANCES: *James Hayes and Gaye Lamb for the applicant; Donald J. McKillop, Q.C., James E. Bowden and R. Murden for the respondent; Roger Oatley, Steven McCullough and Pat McGill for the objectors.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER W. LEE: November 24, 1978

1. The name “Radio Shack A Division of Tandy Electronics Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “Radio Shack.”

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The Board further finds that all employees of the respondent in Barrie save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

5. The Board further finds that all employees of the respondent who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, and persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

6. There is a dispute between the parties with respect to the status of 4 persons

whom the applicant seeks to have included in bargaining unit #1. Accordingly, the Board appoints Mr. C.F. Robicheau, Labour Relations Officer, to inquire into the duties and responsibilities of the following persons and to report to the Board:

L. Bialy

I. Carlson

P. Hunt

D. Wiggins

7. The final resolution of the composition of bargaining unit #1 will be determined following the report of the Labour Relations Officer. However, based upon the evidence before it, the Board finds that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 (with or without the inclusion of the 4 disputed persons), at the time the application was made, were members of the applicant on June 14, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. The Board is further satisfied on the basis of all the evidence before it that more than forty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on June 14, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. The union has asked the Board to apply section 7a in this matter. The membership support evidenced by the union in the part-time bargaining unit (bargaining unit #2) is sufficient only to cause the Board to direct the taking of a representation vote. If, however, the conditions precedent to the application of section 7a exist in this matter, the union would be entitled to certification without a vote. The evidence in support of the union's section 7a request has not been heard and accordingly, the Board must wait until this evidence has been heard or the request that 7a be applied is withdrawn before proceeding further with respect to the disposition of the part-time application.

10. The company alleges that the membership evidence filed in support of the application was obtained by intimidation and coercion and, because of this serious misconduct, should not be relied upon by the Board. The company called three witnesses in support of its allegation that employees had been threatened and intimidated into signing membership cards. The first of these, Mr. Jim Hoare, gave no evidence which would establish the company's position.

11. Mrs. Sandy Prentice, a bargaining unit employee and the second witness called by the company testified that sometime near the end of May, Mrs. Gaye Lamb, the paid union organizer, visited her at her home. It is her evidence that Mrs. Lamb informed her that if she didn't sign a card and the company let her go, the union couldn't back her up. She testified that she indicated she might go to the union meeting that evening to hear the union's

story and asked if she would have to sign a union card. It is her evidence that Mrs. Lamb said to her, "You don't walk out unless you sign a card." Mrs. Prentice did not go to the union meeting and did not sign a union card. When asked by counsel for the company why she did not sign a card she answered that Mrs. Lamb's comments sounded like a threat. Mrs. Lamb admitted visiting Mrs. Prentice at her home. She remembered the visit as having taken place on May 8. She testified that she explained the union's position to Mrs. Prentice and invited her to attend the union meeting. She testified that she said to Mrs. Prentice, "we hope that at the end of the meeting you will sign a card and join with us." It is her evidence that she made this statement in the hope that Mrs. Prentice would attend and sign a card and denied that her remarks were intended to intimidate or coerce Mrs. Prentice.

12. Mrs. Linda Beleskey, also a bargaining unit employee of the company, and the third witness called in support of the company's allegations, testified that Mrs. Lamb and Donna Caddigan (presently the elected union president) visited her at her home. The evidence establishes that the visit took place on June 2nd, 1978 and lasted the better part of an hour. Mrs. Beleskey, who described the meeting as "friendly", testified that Mrs. Lamb stated that "she had subpoenaed some girls to a hearing and if she had to she would subpoena all of the girls." She volunteered at the hearing that she signed a union card because she didn't want to be subpoenaed to appear before the Board. Mrs. Lamb admitted visiting Mrs. Beleskey at her home on June 2nd in the company of Donna Caddigan. Mrs. Lamb testified that when Mrs. Beleskey commented that she had heard the company was going to do away with part-time employees she expressed her concern about the rumours circulating in the plant and stated, "if it means that we'll have to subpoena everyone in the plant to get at the truth of where these rumours are coming from we'll do it." Mrs. Lamb denied that at any time she told Mrs. Beleskey she would be subpoenaed if she did not sign a union card. The evidence establishes that hearings before the Board in respect of a section 79 complaint filed by the union against the company commenced on May 31, 1978; two days before Mrs. Lamb visited Mrs. Beleskey's home. Mrs. Donna Caddigan was called to testify in respect of the June 2nd visit to Mrs. Beleskey's home. Her evidence corroborates that given by Mrs. Lamb.

13. The issue before the Board is not whether Mrs. Prentice and/or Mrs. Beleskey thought they were being intimidated or coerced, but whether or not the evidence establishes that Mrs. Lamb's conduct constituted intimidation or coercion. The Board has reviewed the evidence and is satisfied that Mrs. Lamb's conduct in respect of her solicitation of Mrs. Prentice and Mrs. Beleskey did not constitute intimidation or coercion. Dealing firstly with her conduct in respect of Mrs. Prentice. There is no evidence to suggest that Mrs. Lamb in any way attempted to force Mrs. Prentice to attend at the union meeting scheduled for the evening of May 8th. Indeed, Mrs. Prentice did not attend at that union meeting or any subsequent union meeting. We find it difficult to understand why Mrs. Lamb, a paid union organizer, would make threatening remarks in respect of what might take place at a meeting which Mrs. Prentice was free not to attend. Indeed, it is Mrs. Prentice's evidence that she, and not Mrs. Lamb, suggested that she might attend the union meeting. When considered in context, we find Mrs. Lamb's account to be more plausible and accept that she expressed a "hope" that Mrs. Prentice would sign a union card at the end of the meeting. Mrs. Lamb expressly denied making any threats and we are satisfied that none were made. Although Mrs. Prentice may have interpreted Mrs. Lamb's remark as a threat of some kind, we are satisfied that Mrs. Lamb's conduct in respect of her solicitation of Mrs. Prentice did not, on an objective assessment, constitute coercion or intimidation as would cause the Board to reject all of the membership evidence submitted by the union.

14. The evidence is clear that Mrs. Lamb stated to Mrs. Beleskey that, if necessary, she would subpoena everyone in the plant. The statement, which in the normal course would neither intimidate nor coerce, was not made in a vacuum. We accept the evidence of Mrs. Lamb that the mention of subpoena was made in the context of a conversation dealing with rumours circulating in the plant and pertained to the section 79 hearings which had commenced two days before. Mrs. Beleskey did not suggest that Mrs. Lamb had threatened to subpoena her if she did not sign a union card. Although Mrs. Beleskey may have felt concerned about the possibility of being subpoenaed, Mrs. Lamb's statement – when considered in context and measured against objective standards – cannot be found to have constituted coercion or intimidation as would cause the Board to reject all of the membership evidence submitted by the union. Thus, the union remains in a certifiable position regardless of the weight to be attached to Mrs. Beleskey's membership card.

15. The evidence does not support a finding that Mrs. Lamb used intimidation and/or coercion in the solicitation of union membership and accordingly, the employer's charges are hereby dismissed.

16. Having regard to the statutory definition of "member" and the provisions concerning membership evidence, the Board is satisfied that more than fifty-five per cent of the employees in bargaining unit #1 are "members" of the union, and that therefore the union may be certified without a representation vote. However, section 7(2) of the Act gives the Board the discretion to order a representation vote where it considers it advisable to do so. The practice of the Board is to exercise this discretion in favour of ordering a representation vote where a sufficient number of the employees, who have been found to be union "members", subsequently indicate that they no longer wish to support the union. When faced with this "change of heart", the Board will order a representation vote in order to satisfy itself that, in addition to meeting the statutory membership support requirements, the union continues to enjoy the support of its members.

17. The "change of heart" will often take the form of a petition or statement of desire indicating that the signatories no longer wish to support the union. There is no specific form required for such petition, but it must comply with the requirements of Rule 48, and clearly indicate the member's change of heart. Typically, the petition in opposition to the union is signed by members who have indicated their support only a few days before. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. In these circumstances an employee may sign a petition out of fear that his refusal to do so will be made known to his employer rather than a genuine opposition to the union. It is for this reason that the Board undertakes the enquiry into the origination and circulation of the petition contemplated by Rule 48(5), in order to satisfy itself that the statement in opposition to the union is truly voluntary.

18. The statement of desire filed in opposition to the application bears a sufficient number of signatures which correspond to the signatures of persons in the full-time bargaining unit who signed membership cards that, if proven to be a voluntary expression, will cause the Board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. The petition was the idea of Mr. Steve McCullough, a maintenance worker employed by the company, who, on his own behalf, retained counsel and was advised as to how to proceed. His wife typed the preamble which appears on each of the three

sheets which were filed with the Board. Mr. McCullough commenced circulating the statement on Wednesday, June 7th and obtained one signature that day. The signature was affixed at the home of the employee. Seventeen more signatures were obtained by Mr. McCullough on Thursday, June 8th. All were obtained on company premises and during the working hours of those who signed. The first thirteen signatures obtained on June 8th were affixed to the petition during Mr. McCullough's working hours; the remainder were obtained after his working hours. Eight signatures were obtained by Mr. McCullough on Friday, June 9. All were obtained on company premises and during working hours. Five more signatures were obtained on company premises and during working hours on Monday, June 12th and a further five signatures were obtained under similar circumstances on Tuesday, June 13th. Mr. McCullough testified, and we are satisfied, that in the course of carrying out his job responsibilities as a maintenance man he has access to the entire company premises. He and his assistant are assigned certain "routines" which take them about the plant on a regular basis. The evidence establishes that Mr. McCullough carried the petition with him at all times as he circulated about the company premises during the period June 8 to June 13 inclusive. He carried the petition, which was covered by a blank page, on a clipboard. The evidence establishes from time to time he carried a clipboard in the course of performing his maintenance routines.

19. Mr. McCullough approached Mr. Pat McGill, a bargaining unit employee, in the garage area on June 8th and asked him to sign the petition. Mr. McGill, after discussion with Mr. McCullough, agreed to assist in the circulation of the petition. He took one of the sheets bearing the typed preamble and in the period Thursday June 8th to Monday, June 12th he obtained 17 signatures. All but one of these signatures were also obtained on company premises and during working hours. Mr. McGill returned the sheet with the seventeen signatures he had obtained to Mr. McCullough at about 11:30 a.m. on Wednesday, June 14th.

20. Mr. McCullough left work on Wednesday, June 14th at about 11:30 a.m. after notifying his supervisor's secretary that he had to leave work for personal reasons. He did not receive the permission of Mr. Dewitt, his supervisor, to leave the work place. He collected the sheet which he had given to Mr. McGill and personally delivered the statement of desire to the Board that day. He returned to work at about 3.45 p.m. Mr. McCullough testified that he had left work for personal reasons on one previous occasion.

21. Mr. McCullough denied that he discussed the origination, preparation or circulation of the statement with any member of management. Mr. McCullough admitted, however, that on June 8th he was approached by Paul Best in the company of Tom McClennan (both members of management) and told by Mr. Best that he had heard from employees that Mr. McCullough was circulating a petition on company time. Mr. McCullough testified that he told Mr. Best that he could not discuss the matter and walked away. Miss Lisa Devoe, a bargaining unit employee, gave uncontradicted evidence that she advised Mr. Lyle Robertson, a member of management, that Steven McCullough was circulating a petition. The evidence further establishes that on at least two occasions supervisory personnel were in the general vicinity when Mr. McCullough approached employees with the petition. Mr. McCullough admitted that he had discussed the petition with Mr. Dewitt's secretary; the person he advised on June 14th that he was leaving work for personal reasons.

22. A company notice dated June 8, 1978 was posted prohibiting solicitation on be-

half of the union during working hours and on company premises. The notice, over the signature of Mr. Roy Murden, Personnel and Security, is reproduced below.

"I have received complaints from several of our non-management employees concerning tactics being used by pro-union employees.

In an attempt to force these persons into signing United Steel Workers Membership cards, they are telling persons who are opposed to becoming Union Members that if and when a bargaining unit is established, the non-management employee who hasn't signed a card will be fired.

Nothing could be further from the truth.

Such coercive tactics are pure intimidation.

Two points must be made perfectly clear:

- (1) It is our Company's position that we *will not permit* solicitation for membership by employees on Company premises and during working hours.
- (2) It is our Company's position that we oppose any principle of compulsory union membership and we will not agree that union membership should be a condition of continued employment.

In brief, soliciting on behalf of the Union, on Company premises and during working hours is prohibited.

Any person who is soliciting on behalf of the Union and using intimidating tactics is in violation of Section 61 of the Labour Relations Act.

Should any employee feel they are being intimidated and abused by Union Organizers, I would ask you to contact me immediately at extension 69 and the Company will act on your behalf to eliminate these abusive tactics."

23. Mr. McCullough estimated that half of the employees whom he approached did not sign the statement of desire. He testified that he approached some employees two and three times but never spent more than 10 minutes with any one employee. Mr. McCullough witnessed the signatures of 37 employees who signed the petition. By his own evidence, therefore, he approached approximately 70 employees during the period June 8th to 13th and some of these two and three times. Mr. McCullough admitted that it was generally known in the plant that he was circulating a petition. As has already been indicated the company management made no attempt to interfere with his efforts.

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of

employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors case*, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

25. In this case all but 2 of the signatures were obtained on company premises during working hours. Although 27 of the signatures were obtained by an employee who had access to the entire premises, it is clear on the evidence that Mr. McCullough spent an inordinate amount of work time soliciting employees who themselves were at work. By his own evidence he approached approximately 70 employees, some of them two and three times. It was generally known in the plant that he was circulating a petition and at least three members of management had been told by employees that Mr. McCullough was circulating a petition. Mr. McCullough himself had informed Mr. Gerry Dewitt's secretary that he was circulating a petition. Although he carried a clipboard from time to time in the course of his duties, he carried one at all times during the period June 8th to 13th when he was at work. In these circumstances it could be argued that management must have known what was going on and purposely turned a blind eye. If it was not for the notice dated June 8th which was posted contemporaneously with the circulation of the petition, the Board might not be prepared to infer that management knew and tacitly allowed Mr. McCullough to circulate the petition. The notice, however, is evidence of the fact that management was concerned with and alerted to union solicitation. In these circumstances, and having regard to the evidence which establishes that 3 members of management were told by employees that Steve McCullough was circulating an anti-union petition, we are satisfied that management was aware of Mr. McCullough's activities and by failing to stop his solicitation on company premises during working hours, as it had promised to do in respect of pro union solicitation, it lent tacit support to his efforts.

26. Even if we were not prepared to find that management tacitly supported Mr. McCullough's efforts we would nevertheless be compelled to find that an employee approached by Mr. McCullough in the period from June 8th would reasonably have concluded that management was involved and would likely discover who had signed the statement. It was general knowledge in the plant that Mr. McCullough was circulating an anti-union petition. The company had posted the notice dated June 8th and thereby informed employees explicitly that solicitation on company premises during working hours was prohibited and implicitly that management would be alert to it. On occasion Mr. McCullough approached employees when management persons were in the general vicinity. In these circumstances the employees of the company would reasonably have concluded that management knew what Mr. McCullough was doing and supported him in his endeavours.

27. Mr. Duhamel, the first witness called by the union, testified in cross-examination that, in his opinion, having observed Mr. McCullough, there was no reason why management might have suspected Mr. McCullough. The Board's assessment, however, must be an objective one. Although Mr. Duhamel may be of the view that there was no reason why management would have been suspicious, the evidence, when viewed in its entirety, causes the Board to conclude otherwise. The evidence establishes to the satisfaction of the Board that management was aware of Mr. McCullough's efforts and lent tacit support and approval and further, that any employee approached by Mr. McCullough from June 8th would reasonably have concluded that management was supportive of Mr. McCullough and likely to become aware of who signed his petition and who did not. In the result we are not satisfied that the statement of desire filed in opposition to the application represents a voluntary expression of those who signed it, and accordingly, we are not prepared to exercise our discretion pursuant to section 7(2) of the Act to order a representation vote.

28. The Board is in receipt of a letter from counsel for the company dated October 24, 1978 in which he asks the Board to conduct an inquiry into the bona fides of the Form 8 filed by the union in support of the membership evidence. The letter reads as follows:

"Mrs. G. Lamb, a paid organizer, of the applicant was the person involved in solicitation and collection of union cards for the above application for certification. During a hearing in Board File number 0274-78-M on Saturday, August 12, 1978, Mrs. Lamb testified that at an organizational meeting held on 17th April, 1978 a Mr. Steven Gradon obtained and delivered to her membership cards he had signed by employees of the employer. She indicated she 'thanked him' and said nothing further or asked any questions concerning the same. The cards she received were mingled with other cards she had used on the above application for certification. She testified the same procedure was followed between April 17th and April 24th for membership evidence obtained and used on this application. She was unable to identify how many cards were collected on any occasion and who signed the cards she received.

She also testified a Mr. Pat North, Jr. collected cards and turned them over to her on the 24th of April. She could not give the Board the number of cards she received or what names they represented. These are the same cards she used at the Board on the application for certification.

Furthermore, on Monday, 23rd October, 1978 Mrs. Lamb testified before the Board (File 0475-78-R), she affirmed the information contained in paragraph 2 above. She claimed she received cards from Graydon on 17th of April, 1978. She accepted the cards, 'thanked him' and said nothing more to him or asked any further questions concerning the membership cards.

It is the employer's position the necessary inquiries for completion of form 8 were not made by Mrs. Lamb and therefore could not be made by Mr. Engles to complete the required form on the 15th June, 1978 and filed in support of the above application for certification.

It is now requested the Board conduct its usual inquiry in this matter."

29. The person signing Form 8 attests to the fact that he has made the necessary inquiries to satisfy himself that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues and initiation fees and that each member, on whose behalf a receipt or acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on the receipt or acknowledgment of payment as collector. The person signing the Form 8 must make inquiries in this regard of the person who has signed as collector or of a person who has himself inquired of the collector.

30. The Board accepts the Form 8 attestation on its face unless allegations are made which, if proven, would cause the Board to find that the statements attested to therein are false. If such an allegation is made the Board will conduct an inquiry into the bona fides of the Form 8. Counsel for the company relies on evidence given before the Board which he maintains establishes that Mrs. Lamb accepted cards between April 17 and April 24, 1978, thanked the person submitting the cards, said nothing further and mingled these cards with other cards such that she could not identify the individual cards submitted to her at the time. Even if these alleged facts were to be proven in the course of a Form 8 inquiry, they would not of themselves support a finding that the Form 8 filed in this matter constitutes a false declaration. A Form 8 is not defective merely because inquiries were not made of the collector(s) at the time cards are submitted and neither is it defective if the inquiry is not on a card by card basis. It is sufficient that each collector be asked at a time prior to the signing of the Form 8, whether or not he received one dollar or other suitable payment from each of those he signed into membership and on whose behalf he submitted membership cards. There is no allegation that any of the persons who signed membership documents did not in fact sign them or pay the required membership fee. All of these documents were properly witnessed and countersigned and there is no evidence before us of any irregularity or impropriety which would cast doubt on the membership documents themselves. There is no allegation before the Board that the necessary inquiries were not made by Mrs. Lamb and relayed to Mr. Ingle (the Form 8 declarant) or that they were not made by Mr. Ingle himself prior to the signing of the Form 8. In the result, the Board does not have before it allegations which, if proven, would support a finding that the Form 8 declaration filed in this matter constituted a false declaration. Accordingly, the Board must decline to undertake a formal inquiry in respect of the accuracy of the Form 8 declaration.

31. The Board has before it membership evidence which establishes that more than

fifty-five per cent of the employees in bargaining unit #1 (with or without the inclusion of the 4 disputed persons) as of the date of the instant application were members of the applicant on June 14, 1978 the terminal date fixed for the instant application. The membership evidence satisfies the statutory requirements as to form and substance and accordingly, the Board hereby exercises its authority under section 6(1a) of the Act and certifies the applicant as the bargaining agent of those employees of the respondent who are in bargaining unit #1. The issuance of the formal certificate must await the Board's final determination with respect to the disputed persons.

32. This matter is referred to the Registrar.

DECISION OF BOARD MEMBER W. GIBSON:

I dissent. On the evidence presented before the Board I would have found that the statement of desire (petition) did represent a voluntary expression on behalf of those employees who signed it. It was not unusual for Mr. McCullough to walk around the plant carrying a clipboard, and he was very careful to carry a blank sheet of paper on top of the petition so that it could not be observed. There was no evidence whatsoever that management was involved in the origination, preparation or circulation of the petition. Mr. McCullough was told that he must not involve management and he did not. When he was approached by Paul Best and Tom McClennan on June 8th he walked away without discussing the petition.

Also, my interpretation of the evidence presented before the Board does not lead me to draw the inference that the employees who signed the petition might reasonably suspect the involvement of management.

1083-78-U Toronto Typographical Union No. 91 (I.T.U.), (Complainant),
v. **WEB Offset Publications Limited**, (Respondent).

Practice & Procedure – Natural Justice – Counsel for employer engaged on arbitration board on day fixed for hearing of unfair practice complaint – Sufficient time to brief other counsel – Request denied

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *James Buller and John Thurston for the applicant; R. M. Parry for the respondent.*

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; November 10, 1978

1. This is a complaint under section 79 of The Labour Relations Act in which the complainant alleges that the grievor, Mr. David Shady, has been dealt with by the respondent contrary to the provisions of sections 56, 58, 61 and 70 of the Act.

2. This complaint was filed on September 25, 1978. On October 3, 1978 the respondent was served with a Notice of Hearing indicating that the Board had set October 18, 1978 as the date for the hearing into the complaint. At no point did the respondent contend that it had not received reasonable notice of the hearing.

3. On October 18th Mr. R. M. Parry, a law student, attended at the hearing on behalf of the respondent. Mr. Parry requested that the Board adjourn the hearing to a later date. In support of this request Mr. Parry noted that the solicitor retained by the respondent in this matter was on that day serving as a nominee on a board of arbitration, a matter to which he had committed himself prior to the Board setting this complaint down for hearing. Mr. Parry also noted that Mr. J. Chittick, the respondent's president, was in New York attending a board of directors meeting and that it was the respondent's intention to call Mr. Chittick as a witness in these proceedings. Mr. Buller, the representative of the complainant, opposed the granting of any adjournment. Mr. Buller stated that he had been telephoned by the respondent's solicitor on Friday, October 13, 1978 and asked if he would consent to an adjournment but that he had refused. Mr. Buller indicated that had he been approached earlier about a possible adjournment he would have been amenable to seeing if agreement could be reached on an available date soon after October 18th.

4. As the Ontario Court of Appeal noted in *Re The Journal Publishing Company of Ottawa Limited and The Ottawa Newspaper Guild Local 205* (oral judgment released May 17, 1977, unreported) the law which has grown up around labour relations recognizes the principle that "labour relations delayed are labour relations defeated and denied." The Board deals with fluid situations in which delay will generally cause serious and irreparable prejudice to one of the parties. Because of this the Board has fashioned a procedure with respect to the holding of hearings which recognizes the need for expedition. This procedure is one of long standing and, we would think, well known by those who appear with any regularity before the Board. The procedure was described as follows in *Melnor Manufacturing Limited* [1969] OLRB Rep. March 1288, a case which involved a request for an adjournment due to the fact that counsel for one of the parties was otherwise engaged on the date set for the hearing:

The Board's practice is to schedule hearings for a fixed time and to give sufficient notice of those hearings, so that persons who intend to appear may make the necessary arrangements. Of course if the parties appear at the hearing and request an adjournment based on circumstances beyond their control and if to proceed would be prejudicial to the party making the request the Board will grant an adjournment. It has not been the practice of the Board to grant adjournments merely for the convenience of counsel, as it is the Board's experience that in the field of labour relations delays may cause serious disadvantages.

5. At the hearing Mr. Parry submitted that the solicitor involved had been acting for the respondent in labour relations matters, and that the respondent was entitled to be represented by him in these proceedings pursuant to section 10 of The Statutory Powers Procedure Act. Mr. Buller for the complainant acknowledged that the solicitor had been representing the respondent at negotiations aimed at securing a first collective agreement but added that there had been times when the solicitor could not attend and that on those occasions another solicitor from the same legal firm had been in attendance. It should be noted

that the legal firm involved is comprised of some dozen lawyers, all of whom are highly experienced in labour matters.

6. Section 10 of The Statutory Powers Procedure Act states that "A party to a proceedings may at a hearing ... (a) be represented by counsel". This provision ensures that a party to a proceeding before a statutory tribunal has the right to be represented by counsel at a hearing. It is our view, however, that it neither gives to a party the right to be represented by a particular counsel who because of other commitments is not available to attend on the date set for the hearing, nor does it impose an obligation on the Board to adjourn scheduled hearings to suit the schedule of counsel chosen, regardless of the delay or prejudice which might result. In this case the respondent knew well in advance of the date set for the Board's hearing and had full opportunity to retain counsel. The fact that the respondent's first choice of counsel was already committed at that time did not preclude it from retaining other counsel.

7. With respect to Mr. Chittick, the president of the respondent, the Board was informed only that he was at a board of directors meeting in New York. No information was given concerning the importance of this particular meeting or of any attempts made to change the date of the meeting. It appears to us that Mr. Chittick found himself faced with a choice between attending at a business meeting in New York or a Board hearing in Toronto, and that he chose the former.

8. After entertaining the submissions of the parties the Board reached the conclusion that the grounds put forward by the respondent did not constitute a sufficient basis for granting an adjournment. Accordingly the Board orally refused to grant the requested adjournment. It should be noted that in assessing the respondent's request for an adjournment we were concerned, on the basis of material then before us as well as the representations of the complainant's representative, that any delay in this matter might cause serious prejudice to the complainant.

9. The parties are currently negotiating a first collective agreement. The grievor is an employee of the respondent who has taken an active role in negotiations on behalf of the complainant. As detailed below, we are of the view that the respondent did unlawfully discriminate against the grievor because of his activities on behalf of the complainant. This type of discrimination could only serve as a clear warning to the grievor and to other employees as to what might happen to those who would actively support the complainant. The longer the discrimination goes uncorrected, the greater the resulting potential loss in employee support for the complainant. Any such loss in support, in turn, could only serve to weaken the bargaining position of the complainant in the negotiations for a first agreement.

10. Upon the Board refusing to grant the requested adjournment Mr. Parry stated that in accordance with his instructions he would be withdrawing from the hearing. Although cautioned that for him to withdraw would be at the respondent's peril, Mr. Parry withdrew from the hearing room. The hearing then proceeded in the absence of any representative of the respondent.

11. Subsequent to the hearing counsel for the respondent by telegram requested that the Board reconsider its decision to proceed with the original hearing and requested that a new hearing be scheduled in this regard. No specific grounds were put forward as to why

the Board should re-consider its decision. In these circumstances we are of the view that the Board should neither re-consider its decision nor re-list this matter for hearing.

12. The only witness called to testify at the hearing was the grievor, Mr. David Shady. Mr. Shady testified that he is a paste-up artist who has been employed by the respondent for almost six years. Mr. Shady stated that subsequent to the complainant being certified in March of 1978 he was elected by the employees to serve on the complainant's bargaining committee and that he had taken an active role on behalf of the complainant during negotiations.

13. Mr. Shady testified that he had been advised by Mr. Jan Spanjer, a foreman, that the respondent intended to gradually get rid of those employees who belonged to the union.

14. On September 22, 1978 Mr. N. Cambre, the respondent's vice-president, suspended Mr. Shady for a week for leaving work a few minutes early on several occasions. Mr. Shady testified that it was not unusual for him to leave work a few minutes before or a few minutes after his scheduled working time, depending on when he finished a particular job. He also stated that other employees followed this same practice and that as far as he was aware none of them had ever been disciplined because of it.

15. Prior to September of 1978 Mr. Shady's hours of work were 9 a.m. to 5 p.m. On September 22, 1978 Mr. John Breen, who is in charge of production in the respondent's composition department, informed Mr. Shady that commencing on September 29th his hours of work would be 12.00 noon to 8.00 p.m. Mr. Shady testified that these hours cause him considerable personal inconvenience. He stated that there was at least one other employee with less seniority but the same skills as he who was not moved to the late shift, and also that as far as he could determine the change in his hours of work served no useful purpose. He indicated that frequently when he arrives at work at noon there is still work left over from the previous night that remains to be performed.

16. Section 79(4a) provides that on an inquiry by the Board into a complaint such as this, the burden of proof that an employer did not act contrary to the Act lies with the employer. The respondent was not represented at that part of the hearing which dealt with the merits of the complaint and thus did not lead any evidence to satisfy this burden. On the other hand Mr. Shady in his testimony indicated that he was suspended for conduct which generally has not led to the imposition of any discipline, and that he had his hours of work altered at personal inconvenience to himself notwithstanding the fact that another employee who possessed his skills was not transferred and that in his view no useful purpose was served by the change. In these circumstances we can only conclude that the respondent did in fact deal with Mr. Shady contrary to the Act, and particularly section 58 of the Act, by discriminating against him due to his activities on behalf of the complainant trade union.

17. Having regard to the above conclusion we hereby direct the respondent to compensate Mr. Shady for the period of September 22, 1978 to and including September 28, 1978 at the rate of pay he would have received had he worked during that period. The Board will remain seized of this matter should the parties be unable to reach agreement as to the amount involved. We also direct the respondent to re-instate Mr. Shady to his former hours of work, namely 9 a.m. to 5 p.m.

DECISION OF BOARD MEMBER W. H. WIGHTMAN:

While agreeing with that portion of the majority decision which directs the respondent to reinstate and compensate Mr. Shady, I would not have gone so far as to stipulate his hours of work. To do so, in my view, only raises the possibilities of further problems which the Board is not capable of foreseeing, as well as a series of questions, the first of which might be: "For what period of time is Mr. Shady restricted to the hours of 9 a.m. to 5 p.m.? One day?, One year or In perpetuity?"

0514-78-R Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant), v. **Zimcor Company**, (Respondent), v. Local – 47 Sheet Metal Workers' International Association, (Intervener #1), v. Ontario Council of Painters (Local Union 1819 & Local Union 200), (Intervener #2).

Certification – Construction Industry – Bargaining Unit – Board refusing to define a province wide bargaining unit – Unit based on board areas granted

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Maurice Green and Alan McIsaac for the applicant; M. G. Horan, Harvey Charlap and Ewald Caspar for the respondent; Ronald S. Taylor for intervener #1; Albert Ross, John Kemp and Armando Colafranceschi for intervener #2.*

DECISION OF THE BOARD; November 15, 1978

1. The name: "Ironworkers District Council of Ontario" appearing in the style of cause of this application as the name of the applicant is amended to read: "Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers".
2. This is an application for certification filed pursuant to the construction industry provisions of The Labour Relations Act.
3. The applicant has never proven that it has the status of a trade union under the Act such as would allow it to be certified as the bargaining agent for a unit of employees. A trade union is defined by section 1(1)(n) of the Act in the following terms:

In this Act,

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

4. At the hearing counsel for the applicant contended that the applicant came within the definition of a trade union on two separate grounds, namely, that it is a designated employee bargaining agency and also that it is a certifiable council of trade unions. Although section 9 of the Act makes it clear that not every council of trade unions is certifiable, once a council is certified the effect of section 1(1)(n) is to give the council itself the status of a trade union under the Act.

5. Having regard to the clear wording of section 1(1)(n) we accept that a designated employee bargaining agency is a trade union for the purposes of the Act. In this regard see *Courtland Electric Ltd.* (File No. 0696-78-R, decision dated November 14, 1978, as yet unreported). The question remains, however, as to whether the applicant in these proceedings is in fact a designated employee bargaining agency.

6. The designation relied on by the applicant was issued by the Minister of Labour on March 21, 1978. The relevant portion of the designation is as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, *I hereby designate the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario as the employee bargaining agency to represent in bargaining all ironworkers, save and except rodmen, represented by the following affiliated bargaining agents:*

1. International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario;
or
2. the following Local Unions: 700, 721, 759, 765, 736, 786; or
3. any other Local of the International Association of Bridge, Structural and Ornamental Iron Workers which in the future may be chartered to represent ironworkers,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario ...

(Emphasis added)

7. At the hearing, counsel for the applicant contended that reference in the designation to "the Ironworkers District Council of Ontario" was in fact a reference to the applicant, albeit that the formal name of the applicant is the "Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers". We are prepared to assume, for the purposes of these proceedings, that the reference in the designation order to the Iron Workers District Council of Ontario is in fact a reference to the applicant. Notwithstanding this assumption, however, we are unable to conclude that the applicant is the employee bargaining agency which was designated by the Minister. The Minister jointly designated both the Iron Workers District Council of Ontario *and* the International Association of Bridge, Structural and Ornamental Iron Workers as the employee bargaining agency. Thus the applicant, standing by itself, is not the designated employee bargaining agency

and therefore the Board cannot conclude on this basis that it is a trade union within the meaning of the Act.

8. As already noted, the applicant as an alternative to relying on the designation to establish its status to be certified also contended that it is a certifiable council of trade unions. Having regard to the evidence led in support of this contention the Board finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of The Labour Relations Act and that Locals 700, 721, 759, 765, 736 and 786 (each of which has previously proven its status as a trade union under the Act) are constituent trade unions of the applicant. The Board is also satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 9(1) of the Act. The Board therefore is of the view that if the applicant meets the membership requirements to be certified in the appropriate bargaining unit, then it is in fact entitled to a certificate.

9. The applicant has requested that the bargaining unit be described in terms of ironworkers and ironworkers' apprentices in the employ of the respondent throughout the Province of Ontario. The only two job sites actually affected by the application are both located within Metropolitan Toronto and both come within the industrial, commercial and institutional sector of the construction industry. Applicant's counsel indicated that a province-wide certificate limited to the industrial, commercial and institutional sector of the construction industry would be acceptable to the applicant. It was the position of both the respondent and intervener #2 that the Board should decline to certify the applicant on a province-wide basis. The concern of intervener #2 is that work being done for the respondent by ironworkers in Metropolitan Toronto is performed by glaziers in other parts of the province and that to certify the applicant on a province-wide basis would likely give rise to a number of jurisdictional disputes.

10. Section 108(1) of the Act stipulates that with respect to construction industry certification applications the Board shall determine the bargaining unit by reference to a geographic area. In consequence of this requirement the Board has established 32 geographic areas across the Province by reference to which it determines construction industry bargaining units. A certificate issued with respect to a Board area will generally make no reference to specific sectors within the construction industry and as a result it will cover all employees of the employer within the Board area notwithstanding the fact that the employer may be operating in a number of different sectors. To our knowledge departures from this practice have invariably involved situations where the applicant trade union was seeking to displace an incumbent union, and the bargaining unit in the most recent collective agreement between the incumbent union and the respondent employer was either referable to one or more specific sectors and/or covered a geographic area which did not correspond to one of the Board areas. In such situations the Board has generally adopted the bargaining unit description contained in the collective agreement.

11. The applicant justified its contention that the Board should depart from its practice of certifying trade unions on the basis of the various Board areas by noting that the 1977 amendments to The Labour Relations Act implemented a system of multi-employer, province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. See: *The Labour Relations Amendment Act, 1977*, S.O. 1977, c.31.

12. This is not the only case in which it has been claimed that because of the advent of province-wide bargaining in the industrial, commercial and institutional sector the Board should depart from its established practice of defining construction industry bargaining units on an all-sector Board area basis. In the *Lyle West Electric Limited* case, (File No. 0745-78-R, decision dated November 8, 1978, as yet unreported), however, it was a somewhat different change in Board practice that was being argued for. In that case a local of the International Brotherhood of Electrical Workers had applied to be certified for all electricians and electricians' apprentices in the employ of the employer in Board Area #15. The employer, however, contended that because of the amendments to the Act, the Board should describe the bargaining unit to include only electricians and electricians' apprentices in the Board area engaged in the residential sector, this apparently being the only sector in which the employer was engaged at the relevant time. After a lengthy review of the history which led up to the Board's practice of certifying on an all-sector Board area basis, and a consideration of some of the difficulties which might result from any changes to this practice, the Board in that case concluded that it was not prepared to depart from its standard practice and accordingly certified the applicant for the relevant Board area without any reference to sector.

13. We agree with the conclusion in the *Lyle West Electric* case that the Board should not adopt a practice of certifying trade unions in the construction industry on the basis of particular sectors. The question then is whether bargaining units should now be described on an all-sector Board area basis or an all-sector, province-wide basis. If the applicant's position in favour of province-wide units is accepted it would result in a major shift away from the current situation where trade unions generally organize and acquire representation rights on a local area basis to one where they would be required to organize and acquire representation rights for employees of a particular company right across the province.

14. In determining whether the 1977 amendments to the Act should cause the Board to depart from its existing practice of certifying trade unions on a Board area basis, it must be kept in mind that while the amendments established a system of province-wide negotiations in the industrial, commercial and institutional sector, they did so only with respect to pre-existing bargaining rights, most of which are defined on a local area basis. The Board described this situation in the *United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency* case (File No. 0848-78-U, decision dated August 21, 1978, as yet unreported) as follows:

A reading of the provisions of the Act establishing provincial bargaining indicates that the Legislature intended the foundation of provincial bargaining to be pre-existing local bargaining rights. Section 127(1)(b) clearly provides that the employer bargaining agency is to represent only those employers for whose employees affiliated bargaining agents hold bargaining rights. The bargaining obligation of these employers then vest in the employer bargaining agency by operation of section 131. On the union side, the bargaining rights of the affiliated bargaining agents, by operation of section 130, vest in the employee bargaining agency designated under section 127(1)(a) of the Act. The legal result is simply a consolidation in the bargaining agencies of those bargaining rights and obligations existing at the time of designation. No existing bargaining rights are lost and no new bargaining rights are created.

This kind of consolidation, of course, creates a situation where an employer, even though represented in provincial bargaining, might not be bound by the provincial agreement for all parts of the province. Certification in the construction industry is based upon geographic areas, the province being divided into 32 such areas. It is quite possible for an employer to be certified for some, but not all, of these areas. By operation of section 134(2) the provincial agreement binds an employer only in respect of those employees for whom the bargaining agents hold bargaining rights ...” As a result an employer is bound by a provincial agreement only to the extent that a union has acquired bargaining rights.

15. Not only did the amendments to the Act recognize and not alter the fact that unions now generally hold representation rights on an area basis, but neither did they give any indication that the manner in which representation rights are currently acquired should be altered. This is in sharp contrast to the 1962 amendments to the Act which set up the existing framework for construction industry certifications. See: *The Labour Relations Amendment Act, 1961-62*, S.O. 1961-62, c.68. Prior to that time the Board had certified construction industry bargaining units on both a project and an area basis. As part of the new scheme, however, the predecessor to the current section 108(1) was introduced into the Act expressly prohibiting project certification and requiring that construction industry bargaining units henceforth be described only by reference to a geographic area. A parallel requirement for province-wide bargaining units is notably absent from the recent amendments.

16. As already stated, existing union representation rights in this Province are generally described on a local area basis. This is true even in the great majority of cases where the representation rights have been acquired by way of voluntary recognition rather than certification by the Board. The new amendments to the Act reflect this situation. While province-wide bargaining has been made mandatory in the industrial, commercial and institutional sector, there has been no attempt to alter the existing pattern of locally held representation rights. Against this background it cannot be said that the amendments necessarily point towards province-wide certification.

17. Another factor to be considered in this regard is that when determining a union's right to be certified in the construction industry, the Board takes into account only employees actually at work on the date of the making of the application. Because of the very nature of the industry, a large company which operates in different parts of the province may on any particular day employ only a handful of employees on one or two job sites in a single municipality. If province-wide bargaining units were to be used in certification applications the result may well mean that a handful of employees could determine bargaining rights for such a company's employees right across the province. While it might be argued that this is but an extension to a larger geographic area of what could occur within a single Board area, the realities are that the possibility of a union being certified on the basis of an unrepresentative group of employees is all that much greater if the entire province is under consideration.

18. It strikes us that certification by Board areas reflects a compromise between the extremes of project certification on the one hand, where a union must have its support tested on each new project, and province-wide bargaining units on the other hand which entail a strong possibility that bargaining rights might be acquired on the basis of an unrepresentative group of employees.

sentative group of employees. This is an approach which has basically worked well in the past and, at least at this time, we feel will continue to work well in the future. Accordingly, we are of the view that the Board should not depart from its practice of defining construction industry bargaining units by reference to the Board's geographic areas. More particularly, we are not satisfied that the Board should depart from this practice in the circumstances of this case.

19. The Board finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act. The Board further finds that all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 9(3) of The Labour Relations Act, are deemed to be members of the applicant on June 23, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. At the hearing counsel for the applicant indicated that if the Board were to describe the bargaining unit by reference only to the relevant Board area, his preference was to have any certificate issue in the name of Local 721 of the International Association of Bridge, Structural and Ornamental Ironworkers. This, however, would have the effect of issuing a certificate to a trade union other than that which made the application. We do not regard this as an appropriate procedure and accordingly are of the view that the certificate should issue in the name of the applicant.

22. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1978

BARGAINING AGENTS CERTIFIED DURING OCTOBER

No Vote Conducted

1912-77-R: Thunder Bay Typographical Union, Local 44 of the International Typographical Union (Applicant) v. The Chronicle-Journal and The Times-News (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Thunder Bay employed in the photography, library and editorial departments save and except the publisher, managing editor, editor, Chronicle-Journal editorial page, private secretary to the publisher, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (29 employees in the unit).

2006-77-R: Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Super Disposal Services Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except dispatchers, foremen, persons above the rank of foreman, office and sales staff." (39 employees in the unit). (*Having regard to the agreement of the parties*).

0180-78-R: Ontario Nurses' Association (Applicant) v. Belvedere Heights Home for the Aged (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the Belvedere Heights Home for the Aged, Parry Sound, save and except the Director of Nursing and persons above the rank of Director of Nursing." (10 employees in the unit).

0251-78-R: Canadian Union of Public Employees (Applicant) v. Walter P. Hogarth Memorial Hospital (Respondent) v. Service Employees Union, Local 268 (Intervener).

Unit: "all employees of the respondent in the City of Thunder Bay, engaged in the operation of its boiler house or engaged in general maintenance and repair work, save and except the chief engineer and the maintenance supervisor, persons above the rank of chief engineer and maintenance supervisor, students employed during the school vacation period and persons covered by subsisting collective agreements." (8 employees in the unit).

0293-78-R: International Association of Machinists & Aerospace Workers (Applicant) v. Boeing of Canada Ltd. (Respondent).

Unit: "all office, clerical and technical employees of the respondent at Arnprior, save and except supervisors, foremen, persons above the rank of supervisor and foreman, employees covered by an existing collective agreement for a bargaining unit of production and maintenance employees, the confidential secretary to the Industrial Relations Manager and the confidential secretary to the Chief Accountant." (67 employees in the unit). (*Having regard to the agreement of the parties*).

0302-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. TML Distributors Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Pickering, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (27 employees in the unit).

0459-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Vroom Developments (Central) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0661-78-R: Office and Professional Employees International Union (Applicant) v. Hamilton Wentworth Credit Union Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all office and clerical employees of the respondent in Hamilton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except loan manager, office manager, assistant office manager and persons above those ranks." (17 employees in the unit).

(Bargaining Unit #2 - See Certification Dismissed Subsequent to Post-Hearing Vote).

0740-78-R: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all meat department employees of the respondent in its stores in the municipality of Brantford, Ontario save and except meat manager and persons above the rank of meat manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0761-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Seven-Up Bottling Company (Windsor) Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Windsor, save and except supervisors, persons above the rank of supervisor, and sales supervisor." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0823-78-R: United Brotherhood of Carpenters & Joiners of America, AFL, CIO, CLC (Applicant) v. Fairline Boats Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at the Boat Works, Victoria Avenue, Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (31 employees in the unit). (*Having regard to the agreement of the parties*).

0929-78-R: Central of Independent Unions of the Automobile Industry of Ontario (Applicant) v. Canpark Services Ltd. (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except city manager, district manager, garage manager, office and clerical staff, supervisors and students em-

ployed during the school vacation period.” (44 employees in the unit). (*Having regard to the agreement of the parties*).

0963-78-R: Canadian Chemical Workers Union (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: “all office and clerical employees of the respondent at Sudbury, Ontario, save and except supervisors, persons above the rank of supervisor, registered pharmacists, confidential secretary to the manager, sales staff, purchasing agent, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (2 employees in the unit).

1007-78-R: Labourers’ International Union of North America, Local 607 (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foremen and persons covered by a subsisting collective agreement between the Electrical Power Systems Construction Association and the Ontario Allied Construction Trades Council.” (3 employees in the unit). (*Having regard to the foregoing*).

1013-78-R: Teamsters Local 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Philip Green and Company Limited (Respondent).

Unit: “all employees of the respondent working at and out of Toronto, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

1025-78-R: Labourers’ International Union of North America, Local 183 (Applicant) v. DuBois Chemicals of Canada Limited (Respondent).

Unit: “all employees of the respondent at 64 Kenhar Drive, Weston, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

1029-78-R: Labourers’ International Union of North America Local 1081 (Applicant) v. South Wellington Enclosures (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foreman.” (2 employees in the unit).

1034-78-R: Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent in Brampton, save and except hostesses and persons above the rank of hostess.” (38 employees in the unit). (*Having regard to the agreement of the parties*).

1037-78-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Salvador Excavating (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1041-78-R: International Brotherhood of Painters and Allied Trades-Local Union 1891 (Applicant) v. Central Drywall Company (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*-see Report of full decision (1978) OLRB Rep. October).

1042-78-R: Association of Commercial and Technical Employees, Local 1704, Canadian Labour Congress (Applicant) v. New Welfare Action Centre (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors and those above the rank of supervisor." (3 employees in the unit).

1047-78-R: United Brotherhood of Carpenters and Joiners of America-Local Union 93 (Applicant) v. P. K. Johannsen Construction Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1048-78-R: Service Employees Union, Local 204 affiliated with A.F. of L. C.I.O., C.L.C. (Applicant) v. The Royal Ontario Museum (Respondent).

Unit: "all sales assistants in the employ of The Royal Ontario Museum in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, clerical staff and persons covered by substituting collective agreements. (11 employees in the unit)(*Having regard to the agreement of the parties*).

1049-78-R: United Steelworkers of America (Applicant) v. Galt-British Forge Company (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (61 employees in the unit). (*Having regard to the agreement of the parties*).

1050-78-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Standard Transport Company a Division of Standard Industries Limited (Respondent).

Unit: "all employees of the respondent working at or out of Rodick Road, Markham, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1052-78-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. William Cline Co. Limited (Respondent).

Unit: "all employees of William Cline Co. Limited at 5 Michael Street, Kitchener, Ontario, save and except foremen, foreladies, those above the rank of foreman, forelady, office and sales staff, students employed in the school vacation year and employees who regularly work not more than 24 hours a week." (18 employees in the unit). (*Having regard to the agreement of the parties*).

1057-78-R: United Steelworkers of America (Applicant) v. Hendrickson Mfg. (Canada) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Stratford, save and except foremen, persons above the rank of foreman, office and sales staff." (111 employees in the unit). (*Having regard to the agreement of the parties*).

1067-78-R: Canadian Union of Public Employees (Applicant) v. Back Associates (Respondent).

Unit: "all employees of the respondent at Sudbury Nursing Homes Limited at Sudbury, save and except, Manager, Dietary Supervisor, persons above the rank of Dietary Supervisor and those persons covered by a subsisting collective agreement between Sudbury Nursing Homes Limited and Canadian Union of Public Employees, and its Local 1182." (23 employees in the unit).

1068-78-R: Canadian Union of Public Employees (Applicant) v. Campbellford Memorial Hospital (Respondent).

Unit #1: "all employees of the respondent at Campbellford save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (62 employees in the unit). (*Having regard to the agreement of the parties*).

1069-78-R: Sheet Metal Workers International Association (Applicant) v. Oston Ltd. (Respondent).

Unit: "all employees of the respondent in Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1070-78-R: Canadian Union of Public Employees (Applicant) v. Beaver Foods Limited-Nutricare Division (Respondent).

Unit: "all employees of the respondent in Community Memorial Hospital, Port Perry, save and except supervisor and persons above the rank of supervisor." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1071-78-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Rentway Canada Ltd. (Respondent).

Unit: "all employees of the respondent employed at Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1078-78-R: Labourers International Union of North America, Local 837 (Applicant) v. Carleton Formwork (Ontario) Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 38 (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1088-78-R: Retail Clerks International Union Local 233F (Applicant) v. Joy-Step Footwear Ltd. (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies and persons above the rank of foreman and forelady." (99 employees in the unit). (*Having regard to the agreement of the parties*).

1092-78-R: Labourers' International Union of North America, Local 247 (Applicant) v. Orlando Corporation (Respondent).

Unit: "all construction labourers in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1099-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Donalco Services Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1100-78-R: Ontario Nurses' Association (Applicant) v. Oaklands Regional Centre (Respondent).

Unit #1: "all registered and graduate nurses employed by the Oaklands Regional Centre, Oakville, in a nursing capacity, save and except head nurse, persons above the rank of head nurse, nurses regularly employed for not more than 24 hours per week, and pool staff." (7 employees in the unit). (*Certified*).

Unit #2: "all registered and graduate nurses regularly employed for not more than 24 hours per week, and pool staff, save and except head nurse and persons above the rank of head nurse." (2 employees in the unit). (*Dismissed*).

1104-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Foxhead Inn Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1105-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Carleton Formwork (Ontario) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

1107-78-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Hancock Sand & Gravel Limited (Respondent).

Unit #1: "all truck drivers employed by the respondent at or out of its aggregate operation in Brock Township, save and except foremen, dispatchers, and persons above the rank of foreman and dispatcher, office, sales and technical staff." (24 employees in the unit).

Unit #2: "all production and maintenance employees of the respondent at its aggregate operation in Brock Township, save and except foremen, persons above the rank of foreman, office, sales, and technical staff, students employed during the school vacation period, and persons regularly employed for not more than 24 hours per week." (22 employees in the unit).

1111-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Shipp Corporation Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1112-78-R: Toronto Newspaper Guild, Local 87, The Newspaper Guild (Applicant) v. The Brantford Expositor, A Division of Southam Press (Ontario) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Brantford employed in the circulation department, save and except Circulation Manager, Sales Manager Circulation, persons above the rank of Circulation Manager and Sales Manager Circulation, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit).

1120-78-R: Labourers' International Union of North America Local 247 (Applicant) v. Holscot Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1121-78-R: Labourers' International Union of North America, Local 493 (Applicant) v. Carleton Formwork (Ontario) Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except foremen and persons above the rank of foreman." (11 employees in the unit).

1123-78-R: Canadian Union of Public Employees (Applicant) v. Nepean Child Care Limited (Respondent).

Unit: "all employees of the respondent employed in its day care centre in the Township of Nepean,

save and except programme co-ordinators, day care supervisors, persons above the rank of programme co-ordinator and day care supervisor, office staff, persons employed for less than 24 hours per week and students employed during the school vacation period.” (20 employees in the unit). *(Having regard to the agreement of the parties)*.

1124-78-R: Canadian Union of Public Employees (Applicant) v. Bayshore Day Care Ltd. (Respondent).

Unit #1: “all employees of the respondent employed in its day care centre in the Township of Nepean, save and except programme co-ordinators, day care supervisors, persons above the rank of programme co-ordinator and day care supervisor, office staff, persons employed for less than 24 hours per week and students employed during the school vacation period.” (12 employees in the unit). *(Having regard to the agreement of the parties)*.

Unit #2: “all employees of the respondent at its day care centre in the Township of Nepean regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except programme co-ordinators, day care supervisors, persons above the rank of programme co-ordinator and day care supervisor, and office staff.” (4 employees in the unit). *(clarity note-see Report of full decision (1978) OLRB Rep. October)*.

1140-78-R: Ontario Nurses’ Association (Applicant) v. St. Lawrence Lodge, Home for the Aged (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity at St. Lawrence Lodge, Brockville, save and except the Director of Nursing, and Assistant Director of Nursing.” (23 employees in the unit). *(Having regard to the agreement of the parties)*.

1141-78-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Fitzpatrick Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

1148-78-R: Service Employees Union, Local 210 affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Barnes Rest Home (Respondent) v. Employee (Objector).

Unit: “all employees of the respondent employed at its Rest Home at Dresden, Ontario, save and except, professional medical staff, registered nurses, supervisors, persons above the rank of supervisor, office staff, dieticians, physiotherapists, and occupational therapists.” (16 employees in the unit). *(Having regard to the agreement of the parties)*.

1156-78-R: Teamsters Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. UBA Chemical Industries Limited (Respondent).

Unit: “all employees of the respondent in Mississauga, Ontario save and except foremen, dispatchers, those above the rank of foreman and dispatcher, office and sales staff and students employed during the school vacation period.” (13 employees in the unit). *(Having regard to the agreement of the parties)*.

1157-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Cencourse Project Incorporated (Respondent).

Unit: "carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1158-78-R: Ontario Nurses' Association (Applicant) v. The Canadian Red Cross Society, Blood Transfusion Service (Toronto Centre) (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity by the Canadian Red Cross Blood Transfusion Service (Toronto Centre), save and except Assistant Supervisor, persons above the rank of Assistant Supervisor, and persons employed for more than twenty-four (24) hours per week." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1167-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Canada Wire and Cable Limited (respondent).

Unit: "all employees of the respondent in Orangeville, Ontario, save and except co-ordinators (foremen), persons above the rank of co-ordinator (foreman), office and sales staff." (88 employees in the unit). (*Having regard to the agreement of the parties*).

1171-78-R: Canadian Union of Public Employees (Applicant) v. Good Samaritan Nursing Home (Respondent).

Unit: "all employees of the respondent in Alliston, save and except registered nurses, graduate nurses, activity director, office and clerical employees, housekeeping-laundry-maintenance supervisor, dietary supervisor and persons above the rank of supervisor." (35 employees in the unit). (*Having regard to the agreement of the parties*).

1173-78-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Barrday-Division of Wheelabrator Corporation of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent employed at its operations at 75 Moorefield Street, Cambridge, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (44 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #2: "all employees of the respondent employed at its operations at 51 Roseview Street, Cambridge, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (35 employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

1179-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Oneida Crushed Stone Division of King Paving and Materials Division of the Flintkote Company of Canada Limited (Respondent).

Unit: "all employees of the respondent working at its quarry on McMorran Road in Oneida Township, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, scalemen, dispatchers and security guards." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1193-78-R: International Union of Bricklayers and Allied Craftsmen Local Union No. 7 (Applicant) v. Perry Nieman (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1194-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Damore Bros. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1206-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Marentette Bros. Limited (Respondent).

Unit: "all employees of the respondent working in the Counties of Essex and Kent as instrument men, rodmen, chainmen and party chief, save and except field engineer and persons above the rank of field engineer." (3 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0573-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ventar Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 345 (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*-see Report of full decision (1978) OLRB Rep. October).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	1	

0574-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Vendrasco Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 345 (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*-see Report of full decision (1978) OLRB Rep. October).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	1	

0575-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. T. Barbesin & Sons Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 345 (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit). (*clarity note*-see Report of full decision (1978) OLRB Rep. October).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener	0	

0576-78-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Jack Mocerri Company Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 345 (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*clarity note*-see Report of full decision (1978) OLRB Rep. October).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener	0	

0890-78-R: International Chemical Workers Union (Applicant) v. Canadian Ohio Brass Company Limited (Respondent).

Unit: "all office clerical and technical employees of the respondent at Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, confidential secretaries to the president, chairman of the board and manager of sales, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (47 employees in the unit). (*Having regard for the agreement of the parties*).

Number of names of persons on revised voters' list		45
Number of persons who cast ballots	42	
Ballots segregated and not counted	5	
Number of ballots marked in favour of applicant	21	
Number of ballots marked against applicant	16	

0944-78-R: Christian Labour Association of Canada (Applicant) v. Bekaert Industrial Limited (Respondent).

Unit: "all employees of the respondent at Chatham, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (29 employees in the unit).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	10	

Application Certified Subsequent to Post-Hearing Vote

0727-78-R: United Steelworkers of America (Applicant) v. Monarch Plastics Limited (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during a school vacation period." (51 employees in the unit).

Number of names of persons on list as originally prepared by employer		38
Number of persons who cast ballots		38
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	14	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0995-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Gazzola Paving Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: "all construction labourers, except construction labourers employed on building projects, in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (43 employees in the unit). (*Having regard to the above*).

0718-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. The Ontario Hospital Association (Respondent) v. Group of Employees (Objectors). (522 employees).

0834-78-R: Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351 (Applicant) v. Canpark Services Ltd. (Respondent) v. Central of Independent Unions of the Automobile Industry of Ontario (Intervener). (52 employees).

0933-78-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Armbrø Ready-Mix, a division of Armbrø Materials & Construction Ltd. (Respondent). (5 employees).

1046-78-R: Upholsterers International Union of North America AFL/CIO (Applicant) v. Lampadion Crafts Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed for the school vacation period." (39 employees in the unit). (*Having regard to the agreement of the parties*).

Certification Dismissed Subsequent to Pre-Hearing Vote

0139-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. P & R Concrete Finishing (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of intervener #2	2	

0438-78-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Richelieu Inn (Respondent) v. Hotel and Restaurant Employees Local 743 (Intervener).

Voting Constituency: "All employees of the respondent at Windsor employed as Maintenance Men, Hosemen, Cooks, Dishwashers, Switchboard Operators, Desk Clerks, Cashiers, Maids, Bar Boys, Bus Boys, Ballmen, Bartenders, Waiters and Waitresses save and except the Manager, Assistant Manager, Department Heads, Office and Clerical Staff and persons regularly employed for not more than twenty (20) hours per week." (51 employees).

Number of names of persons on revised voters' list		40
Number of persons who cast ballots	40	
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of intervener	29	

0719-78-R: International Woodworkers of America (Applicant) v. Quality Circuits Manufacturing Limited (Respondent).

Voting Constituency: "All employees of the respondent, in Metropolitan Toronto, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (28 employees.)

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	18	

Certification Dismissed Subsequent to Post-Hearing Vote

1332-77-R: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union (Applicant) v. Frito-Lay Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of Frito-Lay Canada Limited at its premises in Kitchener, save and except office manager, quality control manager, persons above the rank of manager and quality control manager, and the secretary/receptionist." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	13	

0661-78-R: Office and Professional Employees International Union (Applicant) v. Hamilton Wentworth Credit Union Limited (Respondent) v. Group of Employees (Objectors).

Unit #2: "all office and clerical employees of the respondent in Stoney Creek, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except loan manager, office manager, assistant office manager, persons above those ranks." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	1	

(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).

0793-78-R: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Union (Applicant) v. Golden Arrow Inflight Catering Services Ltd. (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (22 employees in the unit).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	19	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant Union	3	
Number of ballots marked against applicant Union	15	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1009-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. George Wimpey Canada Limited (Respondent). (8 employees).

1020-78-R: Labourers International Union of North America, Local 837 (Applicant) v. A. P. Green Refractories (Canada) Ltd. (Respondent). (10 employees).

1024-78-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Quality Plumbing and Heating (Respondent) v. Group of Employees (Objectors). (3 employees).

1032-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW) (Applicant) v. Beclawat (Ontario) Ltd. (Respondent) v. Beclawat Employee Association (Intervener). (61 employees).

1086-78-R: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. York Hannover Developments Ltd. (Respondent). (3 employees).

1087-78-R: Teamsters Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. UBA Chemical Industries Limited (Respondent). (14 employees).

1089-78-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Muenster H. Construction (Respondent). (2 employees).

1098-78-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. H. Muenster Construction Limited (Respondent) (2 employees).

1119-78-R: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Abicon Limited (Respondent) v. International Association of Bridge, Structural & Ornamental Iron Workers, Local Union 721 (Intervener). (2 employees).

1126-78-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., AFL., CIO., CLC. (Applicant) v. Runnymede Hospital (Respondent). (4 employees).

APPLICATIONS UNDER SECTION 1(4)

1876-77-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Harold R. Stark Limited and Superior Plumbing and Heating Company Limited (Respondents). (2 employers). (*Dismissed*).

1935-77-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Farquhar Construction Limited, Port-A-Room Manufacturing Limited and Enterprize Investments Limited (Respondents) v. Group of Employees of Port – A-Room Manufacturing Limited (Objectors). (2 employers). (*Dismissed*).

0712-78-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Rochefort Construction Limited and Des' Build Development Ltd. (Respondents). (2 employers). (*Withdrawn*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

1999-77-U: Roderick John Maclean (Complainant) v. Robert Myers, c/o Canadian Gypsum Construction (Respondent).

2000-77-U: Charles C. Lodge (Complainant) v. Canadian Gypsum Co. (Respondent).

2001-77-U: James Pollock (Complainant) v. Canadian Gypsum Construction (Respondent).

2022-77-U: Gerald Chevette (Complainant) v. Canadian Gypsum Construction (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0747-78-R: Harry William Hubert (Applicant) v. Hotel, Restaurant Employees Union, Local 743, affiliated with Hotel & Restaurant Employees and Bartenders International Union (AFL- CIO-CLC) (Respondent) v. Windsor Raceway Holdings Limited (Intervener). (*Granted*).

Unit: "all employees of the maintenance department of Windsor Raceway Holdings Limited, save and except foremen, persons above the rank of foreman, students employed during the school vacation periods and persons regularly employed for not more than 24 hours per week." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	17	
Ballots segregated and not counted	2	
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	14	

0777-78-R: William Mahoney (Applicant) v. Can. Union of Retail Employees C.L.C. (Respondent) v. Rose & LaFlamme Limited (Intervener). (*Granted*).

Unit: "all warehouse employees of Rose & LaFlamme Limited at 461 Horner Avenue, Etobicoke, save and except foremen and persons above the rank of foreman." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	10	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	10	

0967-78-R: Robert Mach (Applicant) v. United Steelworkers of America (Respondent). (*Dismissed*).

1014-78-R: Bargaining Unit Employees of Neo Industries Limited (Applicant) v. Local 1267 of the Oil & Gas Technicians, Service, Domestic and General Workers L.I.U. of N.A. (Respondent) v. Neo Industries Limited (Intervener). (17 employees). (*Dismissed*).

1043-78-R: Kathy Monaghan (Applicant) v. Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Respondent). (35 employees). (*Dismissed*).

1114-78-R: Alex F. Moores (Applicant) v. United Steelworkers of America (Respondent). (3 employees). (*Dismissed*).

1154-78-R: The Employees of Kondo Contract Interiors Limited (Applicant) v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 1747, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America (Respondent). (4 employees). (*Dismissed*).

1160-78-R: Versa-Care Nursing Home-Owen Sound Branch (Applicant), v. Christian Labour Association of Canada (Respondent). (75 employees). (*Dismissed*).

1170-78-R: John Hackett (Applicant) v. International Woodworkers of America (Respondent). (48 employees). (*Dismissed*).

1229-78-R: Bargaining Unit Employees of Neo Industries Limited (Applicant) v. Local 1267 of the Oil & Gas Technicians, Service, Domestic and General Workers L.I.U. of N.A. (Respondent). (17 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1127-78-U: Standard Induction Castings Limited (Applicant) v. Isshac Abrahamian, et al. (Respondents) v. U. A. W. and its Local 195 (Interested Party).

- and -

1128-78-U: Standard Induction Castings Limited (Applicant) v. Isshac Abrahamian, et al (Respondents) v. U. A. W. and its Local 195 (Interested Party). (*Granted*).

1134-78-U: Kanmet Ltd. (Applicant) v. Charles Buckwell et al. (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0796-78-U: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Union (Applicant) v. Golden Arrow Inflight Catering Services Ltd. (Respondent). (*Withdrawn*).

0882-78-U: United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Applicant) v. Fairline Boats Limited (Respondent). (*Withdrawn*).

1129-78-U: Standard Induction Castings Limited (Applicant) v. Isshac Abrahamian, Luciano Abreu, et al (See Schedule "A") (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1185-77-U: Service Employees' International Union (Complainant) v. Western Fair Association (Respondent). (*Dismissed*).

1745-77-U: Office & Professional Employees International Union (Complainant) v. Racine, Robert and Gauthier Reg'd (Respondent). (*Terminated*).

0326-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. York-Hanover Developments Ltd., John Holgate, Gabor Preczner, Christine Swabey, R. Bendak, G. Deroche, K. Dechamps, W. Walker and Evangelos Marantos, carrying on business as Perfect Metro Cleaners (Respondents). (*Withdrawn*).

0355-78-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers (Complainant) v. Finlock Beverages Limited, carrying on business as Cavalier Beverages (Respondent). (*Granted*).

0538-78-U: Graduate Assistants Association, Local 2 (Complainant) v. The Governing Council of the University of Toronto (Respondent). (*Withdrawn*).

0651-78-U: Inocentas Jurcevicius (Complainant) v. United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 707 and Ford Motor Company of Canada Limited (Respondents). (*Dismissed*).

0657-78-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Wilkinson Foundry Facing and Supply Company Limited (Respondent). (*Granted*).

0798-78-U: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Union (Complainant) v. Golden Arrow Inflight Catering Services Ltd. (Respondent). (*Withdrawn*).

0805-78-U: C.U.P.E. and its Local # 1320 (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Granted*).

1045-78-U: C.U.P.E. Local 1320 (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Dismissed*).

0877-78-U: The London and District Service Workers' Union Local 220, S.E.I.U., AFL CIO CLC (Complainant) v. Kenneth R. Green (Respondent). (*Dismissed*).

0885-78-U: United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Complainant) v. Fairline Boats Limited (Respondent). (*Withdrawn*).

0892-78-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks Limited (Respondent). (*Withdrawn*).

0946-78-U: United Steelworkers of America (Complainant) v. Monarch Plastics Ltd. (Respondent). (*Withdrawn*).

0983-78-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. Adelaide Maintenance Limited (Respondent). (*Withdrawn*).

0992-78-U: Spiros Tsiopoulos (Complainant) v. Local Union No. 232, United Rubber, Cork, Linoleum and Plastic Workers of America (Respondent). (*Withdrawn*).

0997-78-U: Local 1590, International Brotherhood of Electrical Workers (Complainant) v. Cable Tech Wire Company Limited, and Siegfried Riemer (Respondents). (*Granted*).

1008-78-U: International Brotherhood of Electrical Workers, Local Union 120 (Complainant) v. Hossack & Matthews Ltd. (Respondent). (*Dismissed*).

1015-78-U: Retail Clerks Union, Local 206 chartered by-The Retail Clerks International Union (Complainant) v. Tip-Top Tailors (Respondent). (*Withdrawn*).

1016-78-U: Retail Clerks Union, Local 206 chartered by-The Retail Clerks International Union (Complainant) v. Tip-Top Tailors (Respondent). (*Withdrawn*).

1017-78-U: Retail Clerks Union, Local 206 chartered by-The Retail Clerks International Union (Complainant) v. Tip-Top Tailors (Respondent). (*Withdrawn*).

1019-78-U: United Steelworkers of America (Complainant) v. Canadian Industries Limited, Explosives Division, Garson Ontario Works (Respondent). (*Withdrawn*).

1033-78-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW) (Complainant) v. Beclawat (Ontario) Ltd. (Respondent). (*Withdrawn*).

1051-78-U: David Gallawan (Complainant) v. Babcock & Wilcox Canada Ltd. and United Steelworkers of America Local 2859 (Respondent). (*Dismissed*).

1055-78-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union A.F.L., C.I.O., C.L.C. (Complainant) v. Queensbury Inn Enterprises Inc. known as: Queensbury Arms (Respondent). (*Withdrawn*).

1076-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 (Complainant) v. Richmond Inn Ltd. known as Richmond Inn Motor Hotel (Respondent). (*Withdrawn*).

1082-78-U: Ontario Nurses' Association (Complainant) v. Hawkesbury and District General Hospital (Respondent). (*Withdrawn*).

1093-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant) v. Kilian Manufacturing Limited (Respondent). (*Withdrawn*)

1102-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 (Complainant) v. Lansdowne Tavern Ltd. (Respondent). (*Withdrawn*)

1137-78-U: Retail Clerks Union Local 206, chartered by the Retail Clerks International Union (Complainant) v. Coles the Book People (Respondent). (*Withdrawn*)

1151-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Controlled Systems (Windsor) Limited (Respondent). (*Withdrawn*).

1169-78-U: Louis Romanelli (Complainant) v. Printing Specialists and Paper Products Union Local 466 and Dow Chemical of Canada Limited (Respondents). (*Withdrawn*)

1174-78-U: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Com-

plainant) v. Barrday, Division of Wheelabrator Corporation of Canada Limited (Respondent). *(Withdrawn)*.

1210-78-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood & Teamsters Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Rentway Canada Ltd. (Respondent). *(Withdrawn)*.

1214-78-R: Foster Wheeler Limited (Complainant) v. Labourers' International Union of North America, Local 1089, Rocco D'Andrea, Orfeo Iacobelli, Michael Grover, Robert Longwell, Val Neill, John Stark, Frank Vennari (Respondents). *(Granted)*.

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0927-78-M: Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union) v. The Textile Rental Institute of Ontario (Employer). *(Granted)*.

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 78

0826-78-U: Ontario Public Service Employees Union (Complainant) v. Fanshawe College of Applied Arts and Technology (Respondent). *(Dismissed)*.

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

0803-78-U: Ontario Public Service Employees Union (Applicant) v. Cambrian College of Applied Arts and Technology (Respondent). *(Granted)*.

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0032-78-M: Canadian Union of Public Employees (Trade Union) v. Corporation of the City of London (Employer). *(Dismissed)*.

0501-78-M: Regional Municipality of Niagara (Applicant) v. Canadian Union of Public Employees, Local 1287 (Respondent). *(Granted)*.

0521-78-M: United Steelworkers of America (Applicant) v. Otaco Limited (Respondent). *(Withdrawn)*.

0828-78-M: The Corporation of the Town of Essex (Applicant) v. Canadian Union of Public Employees, Local 702 (Respondent). *(Withdrawn)*.

0898-78-M: Green Acres Nursing Home (Applicant) v. Pharmacists and Professional Employees Association, Local Union 1976 (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

0450-78-M: London Generator Service (Employer) v. International Union, United Automobile Aerospace Agricultural Implement Workers of America and its Local 27 (Trade Union). (*Dismissed*).

0918-78-M: Kenneth R. Green, carrying on business as Green's Ambulance (Employer) v. The London and District Service Workers' Union Local 220, S.E.I.U., AFL CIO CLC (Trade Union). (*Dismissed*).

0897-78-M: Cecchetto & Sons Limited (Employer) v. Labourers' International Union of North America, Local 493 (Trade Union). (*Terminated*).

0977-78-M: The Utility Contractors Association of Ontario (Employer) v. Labourers' International Union of North America, Local 527 (Trade Union) v. The Ontario Provincial District Council of the Labourers' International Union of North America (Intervener). (*Granted*).

1062-78-M: Kilmer Van Nostrand Co. Limited (Employer) v. United Brotherhood of Carpenters and Joiners of America Local Union 38 (Trade Union). (*Terminated*).

1142-78-M: D. L. Stephens Contracting (Niagara) Ltd. (Employer) v. United Brotherhood of Carpenters and Joiners of America Local Union 38 (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112A

1859-77-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The General Contractors' Section of the Toronto Construction Association and Steeple Jack Services (Respondents) (*Withdrawn*).

0599-78-M: The Toronto Building and Construction Trades Council, International Union, of Bricklayers and Allied Craftsmen, Local 2, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicants) v. The General Contractors Section of the Toronto Construction Association West York Construction Limited, Bau Canada Limited, The Masonry Industry Employers Council of Ontario (Respondents). (*Withdrawn*).

0726-78-M: The Toronto Building and Construction Trades Council International Union of Bricklayers and Allied Craftsmen, Local 2, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicants) v. The General Contractors Section of the Toronto Construction Association, West York Construction Limited, The Masonry Industry Employers Council of Ontario (Respondents). (*Withdrawn*).

0759-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Arena Cement Finishing Co. (Respondent). (*Dismissed*).

0991-78-M: The Ontario Acoustical and Drywall District Council AND Harry Braid (Applicant) v. Perfect Acoustic and Drywall Company Limited, AND Ontario Acoustical Association (Respondents). (*Withdrawn*).

1021-78-M: The Electrical Trade Bargaining Agency, Comstock International Limited and Electrical Construction Association of Hamilton (Applicant) v. The Construction Council of Ontario of the International Brotherhood of Electrical Workers and The International Brotherhood of Electrical Workers, Local 105 (Respondents) (*Withdrawn*).

1022-78-M: The Electrical Trade Bargaining Agency, Jaddco Anderson Construction Limited and Electrical Construction Association of Hamilton (Applicant) v. The Construction Council of Ontario of the International Brotherhood of Electrical Workers and The International Brotherhood of Electrical Workers, Local 105 (Respondent). (*Withdrawn*).

1073-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. Cornwall Gravel Company Ltd. (Respondent). (*Withdrawn*).

1074-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. Grant Ready Mix Limited (Respondent). (*Withdrawn*).

1075-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. West Front Construction (Respondent)). (*Withdrawn*).

1079-78-M: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. Comstock International Limited (Respondent) (*Withdrawn*).

1080-78-M: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. Jaddco Anderson Construction Limited (Respondent). (*Withdrawn*).

1081-78-M: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. Electrical Trade Bargaining Agency (Respondent). (*Withdrawn*).

1090-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Hutchison Mechanical Installations Limited (Respondent). (*Granted*).

1118-78-M: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Niagara River Construction Limited (Respondent). (*Withdrawn*).

1166-78-M: Christian Labour Association of Canada (Applicant) v. Shar-Dee Contracting Ltd. (Respondent). (*Granted*).

1168-78-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 (Applicant) v. The Canadian Automatic Sprinkler Association, and Verhey Sprinkley Limited (Respondents). (*Withdrawn*).

1181-78-M: Labourers International Union of North America, Local 527 (Applicant) v. Yvon Levesques & Johnston Ltd. (Respondent). (*Withdrawn*).

1182-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Canadian Independent Sod Ltd. (Respondent). (*Withdrawn*).

1204-78-M: Labourers' International Union of North America, Local Union 183 (Applicant) v. Tru-Wall Group Ltd. (Respondent). (*Withdrawn*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

0139-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. P & R Concrete Finishing (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).



Labour
Relations Board

Decisions

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ONTARIO LABOUR RELATIONS BOARD

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Our File Number

N O T I C E

REGARDING THE SCHEDULING OF
HEARINGS ON
APPLICATIONS FOR CERTIFICATION

Commencing July 3, 1979, certification hearings will regularly be scheduled on TUESDAYS of each week, including weeks where Monday is a holiday.

This change from Monday to Tuesday will be on a trial basis and will be evaluated in the Fall. In this regard, representations from persons or organizations affected by the change will be welcome.

A handwritten signature in dark ink, appearing to read "Stewart D. Saxe".

Stewart D. Saxe,
Director.

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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IV

Jurisdictional Dispute – Discussion of criteria for resolution of dispute – Whether new collective agreement with private resolution mechanism effects present case – Whether Board should limit its direction.

MAC J. BRIAN MECHANICAL LTD. RE IRON-WORKERS LOCAL 700 ET AL

1118

Practice & Procedure – Charges – Reconsideration – Construction Industry – Board declining to reopen and reconsider certificate – Alleged petition not clearly repudiating membership, and not filed with Board in accordance with rules – Charges of improper conduct not particularized – No hearing granted.

ACADEMY PROPERTY MANAGEMENT LIMITED RE LABOURERS' LOCAL 527

1062

Reconsideration – Charges – Practice & Procedure – Construction Industry – Board declining to reopen and reconsider certificate – Alleged petition not clearly repudiating membership, and not filed with Board in accordance with rules – Charges of improper conduct not particularized – No hearing granted.

ACADEMY PROPERTY MANAGEMENT LIMITED RE LABOURERS' LOCAL 527

1062

Reference – Employee – Whether subject employees exercise managerial functions.

HAMILTON-WENTWORTH, THE CATHOLIC CHILDREN'S AID SOCIETY OF CUPE LOCAL 1797

1115

Related Employer – Successor Status – Sale of a Business – Successor employer becoming bound by agreement – Successor subsequently intermingling employees with those of related employer which has similar agreement with same trade union – Board extending recognition clause and thereby raising bar to new certification application.

REID AGGREGATES LIMITED RE C.L.A.C., ET AL

1134

S-79 – S-123 – Construction Industry – Unfair practice allegation involving allegedly illegal conduct in connection with no subcontracting arrangement – Alleged illegal interference with complainants in order to enforce no sub-contracting arrangement – No illegal interference with employer organization – No direction made “in the air” when evidence does not establish immediate wrongdoing.

MASONRY CONTRACTORS' ASSOC. (TORONTO INC.) RE BRICKLAYERS INDEPENDENT UNION, TCA, ET AL

1123

S-79 – Interference with Trade Union – Employer failure to reinstate employee to former position and continued harassment held to be failure to comply with Board order.

RADIO SHACK RE UNITED STEELWORKERS OF AMERICA

1128

S-79 – Interference with Trade Union – Evidence of employee meetings and other collective activity but no evidence of “trade union” activity – Discharges not motivated by anti-union animus or intent to frustrate possible organization. Complaint dismissed.

BOB MILLER BOOK ROOM INCORPORATED RE RICHARD MEHRINGER ET AL

1066

Sale of a Business – Related Employer – Successor Status – Successor employer becoming bound by agreement – Successor subsequently intermingling employees with those of related employer which has similar agreement with same trade union – Board extending recognition clause and thereby raising bar to new certification application.	
REID AGGREGATES LIMITED RE C.L.A.C., ET AL	1134
Sale of a Business – Successor Status – Complicated transaction between related corporate entities in order to exploit convenience food part of total retail food market – Surrender of lease, execution of new lease, and extended shutdown – Successor status found.	
GORDONS MARKETS RE C.F.A.W. LOCALS 175 and 633	1102
S-123 – S-79 – Construction Industry – Unfair practice allegation involving allegedly illegal conduct in connection with no sub-contracting arrangement – Alleged illegal interference with complainants in order to enforce no subcontracting arrangement – No illegal interference with employer organization – No direction made “in the air” when evidence does not establish immediate wrongdoing.	
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REID AGGREGATES LIMITED RE C.L.A.C., ET AL	1134
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GORDONS MARKETS RE C.F.A.W. LOCALS 175 AND 633	1102
Termination – Timeliness – Termination application held to be untimely if made during compulsory interest arbitration process but prior to issuance of interest arbitrator’s award.	
SALVATION ARMY GRACE HOSPITAL RE C.L.A.C., ET AL	1142

Termination – Board declining to exercise its discretion under section 51 where it was not satisfied that the union had slept on its bargaining rights.

INTERNATIONAL MOLDERS & ALLIED WORKERS UNION RE SCOTT SHUTE ET AL 1144

Termination – Board declining to exercise its discretion under section 51 where trade union has not slept on its bargaining rights.

RETAIL CLERKS UNION LOCAL 206 RE ERIC DOUGLAS McLARTY ET AL 1140

Termination – Termination Application following acrimonious dispute and successful good faith bargaining complaint – Insufficient ground to decline to entertain application – Petition voluntary despite atmosphere.

CASIMIR, JENNINGS AND APPLEBY CORPORATION OF THE MUNICIPALITY OF RE LABOURERS' LOCAL 493 1074

Timeliness – Termination – Termination application held to be untimely if made during compulsory interest arbitration process but prior to issuance of interest arbitrator's award.

SALVATION ARMY GRACE HOSPITAL RE C.L.A.C., ET AL 1142

Trade Union – Collective Agreement – Certification – Agreement between employee group and employer raised as bar to certification – Group not a trade union – Agreement not a collective agreement.

DURHAM METAL STAMPING & ASSEMBLIES LTD. RE U.E. 1093

1040-78-R Labourers' International Union of North America, Local 527, (Applicant), v. **Academy Property Management Limited**, (Respondent).

Construction Industry – Charges – Practice & Procedure – Reconsideration – Board declining to reopen and reconsider certificate – Alleged petition not clearly repudiating membership, and not filed with Board in accordance with rules – Charges of improper conduct not particularized – No hearing granted

BEFORE: R. A. Furness, Vice-Chairman, and Board Members W. H. Wightman and O. Hodges.

DECISION OF THE BOARD; December 4, 1978

1. In a decision dated September 28, 1978, the Board issued a certificate to the applicant. The terminal date fixed for this application was September 26, 1978. In its decision dated September 28, 1978, the Board denied the respondent's request for a hearing.
2. On October 13, 1978, the Board received the following letter, which was also dated October 13, 1978, from the respondent. The letter reads as follows:

Please be advised that we wish to appeal the Certificate granted to Labourers' International Union of North America Local 527 for the following reasons:

1. We were informed by our employees that they were misled by the Union representatives as to the documentary evidence they were requested to sign. (Both employees have limited knowledge of the English language.) According to our information they were advised by the Union Representatives that they were signing a certificate for the Union Welfare Plan which we understand was not even completed and contained many blank spaces.
2. Upon being notified of such improper conduct by the Union we brought it to your attention because we believed it to be an unfair labour practise [sic] and in our reply to the Board dated September 25, 1978, we requested a hearing in order to give us an opportunity to verify the truth. It was our intention to question under oath both the employees and the Union Representative as to the true facts.
3. According to your notice a temporary hearing was scheduled on October 2, 1978 but since on that day I was out of the country on important Company business I had requested by phone that the hearing be postponed to a later date. I was assured by an employee of the Board that there would be no problem to accomodate our request. We therefore were highly surprised to receive notification that a certificate was granted to the Union rather than a notice of a new hearing date.
4. We further understood that our employees forwarded a petition to the Labour Board expressing their wishes not to be represented by the

applicant. It is quite possible that their petition was not received in time by the Board due to the mail strike that was in effect at that time in Ottawa and Toronto.

What in fact we are requesting the Board is to give us an opportunity of a formal hearing and be satisfied in light of the above allegation that our employees truly wish and by their own free will to be represented by the Applicant and if so we will negotiate with the Union in good faith. If, however, evidence would come to light that the Union acted improperly and or that our employees did not wish to be represented by the applicant, we would respectfully request that the application granted to Labourers' International Union of North America, Local 527 be rescinded.

3. On October 25, 1978, the Board received the following letter, which was dated October 23, 1978, from the applicant. The letter reads as follows:

We acknowledge receipt of your communication dated October 16, 1978, and the copy of a letter of the Respondent in this case.

The Board in his decision dated September 28, 1978 denies a hearing to the Respondent saying that, "Where a party is alleging improper or irregular conduct, it is required to include in its communication to the Board a concise statement of the material facts, actions and omissions upon which it intends to reply as constituting such improper or irregular conduct."

Considering the letter of the Respondent dated October 13, 1978, again we do not find any particular of the broad allegation against the Applicant, and therefore the request of the Respondent to reconsider the decision of the Board ought to be denied.

With the above we do not admit that the allegations of the Respondent are true, but rather we are of the opinion that the Respondent is interfering with the formation of the Union.

4. On October 10, 1978, the following letter was received by the Employment Standards Branch of the Ministry of Labour:

Regarding File #1040-78-R
ACADEMY Property Management
Ottawa, Ont.

Sept. 26, 1978

Dear Sir:

Regarding my employment with the firm Academy Property Management Limited. I have heard that the company I am working for are having problems with the union. Please be advised that I am receiving union wages and am being payed [sic] overtime under union law hours.

For two years I have barely worked and received no U.I.C. benefits and the union didn't help me and I had no union jobs because the union had no jobs to give me. I have found this job myself and am satisfied with the company I am working with. I wish the union would stop making trouble for the company and for the labourers.

Yours truly
(one signature)
(address).

5. In its decision dated September 28, 1978, the Board denied the respondent's request for a hearing and found that there was nothing before the Board which merited a hearing. The Board noted that where a party was alleging improper or irregular conduct, it was required to include in its communication to the Board a concise statement of the material facts, actions and omissions upon which it intended to rely as constituting such improper or irregular conduct. The Board added that it was the function of the respondent to present the facts to the Board and that it was not the function of the Board to make inquiries based upon the assumptions of the respondent as set forth in its reply.

6. The Board now proposes to deal with the letter from the respondent dated October 13, 1978. The respondent received from the Board Form 51, Notice of Application for Certification, Construction Industry. Paragraph nine of this form states:

9. *If the Board determines that a hearing of this application is to be held, the hearing will take place at the Board Room, 400 University Ave., Toronto 2, Ont. on Monday, the 2nd day of October, 1978, at 9:30 o'clock in the forenoon E.D.T. (The portion which is underlined appears in bold type.)*

If the Board determines that such hearing take place, the respondent will be served with a Notice of Hearing in Form 53. (The portion which is underlined appears in bold type.)

7. In our view the wording in paragraph 9 of Form 51 is clear and unambiguous. There is no reference in any of the material which was sent to the respondent to a "temporary" hearing. Certainly the wishes of a party with respect to a hearing date may be accommodated by the Board on the agreement of the parties to a proceeding before the Board. However, the Board has the discretion whether to hold a hearing. In an application for certification which is filed under the construction industry provisions of The Labour Relations Act, the Board need not hold a hearing. Reference is made to section 91(13) of The Labour Relations Act. The Board determined in its decision dated September 28, 1978, that there was nothing before it which merited a hearing. The Board made this determination after considering paragraph 14(3) of the respondent's reply.

8. In a letter to the respondent September 18, 1978, the Registrar advised the respondent that "Copies of the Labour Relations Act and the Board's Rules of Procedure are available upon request". The Registrar also advised the respondent as follows:

You will note that *if* the Board determines that a hearing of this appli-

cation is to be held, such a hearing would be held at its Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario, M7A 1V4 at 9.30 a.m. E.D.T. on Monday, October 2nd, 1978.

You will note further that *if* such hearing is to take place, the respondent will be served with a Notice of Hearing in Form 53.

(The underlining occurs in the Registrar's letter.)

9. Where a party desires to file allegations of improper or irregular conduct, it is required to comply with the provisions of section 47 of the Board's Rules of Procedure with respect to particularity and promptness. In our opinion the respondent's allegations still lack sufficient particularity and have not been filed in a timely manner. The respondent was apparently aware of the alleged facts upon which it seeks to file allegations of improper or irregular conduct as early as September 25, 1978. However, the respondent did not file its allegations (as opposed to assumptions) until October 13, 1978, some seventeen days after the terminal date of this application. In applications for certification which are filed under the construction industry provisions of The Labour Relations Act, the Board expedites these proceedings for the reasons set forth in the *Lyle West Electric Limited* case, unreported decision of the Board dated November 8, 1978, Board File No. 0745-78-R. Section 91(13) of the Act empowers the Board, subject to the approval of the Lieutenant Governor in Council, to make rules to expedite proceedings before the Board to which sections 106 to 124 apply. In this regard see sections 63 to 75, inclusively, of the Board's Rules of Procedure.

10. The Board now considers the letter dated September 26, 1978, which was signed by one person and which was sent to the Employment Standards Branch of the Ministry of Labour. In our opinion this letter is not a statement of desire as set forth in section 48 of the Board's Rules of Procedure and as referred to in Form 52, Notice to Employees of Application For Certification, Construction Industry. The letter, in our view, does not set forth opposition to this application as referred to in section 48 of the Board's Rules of Procedure. The letter does not indicate that the person who signed it opposes this application for certification. In addition, this letter was not filed with this Board.

11. However, even if it could be said that this letter dated September 26, 1978, is in the form of a statement of desire in opposition to this application, it was not filed with the Board as required by the Board's Rules of Procedure. The Form 52, Notice to Employees of Application for Certification, Construction Industry, specifically refers to this requirement and states the Board's address. In this regard see the *Canadian Stebbins Engineering & Manufacturing Co. Ltd.* case, [1965] OLRB Rep. July, 280, where the Board referred to the clear instructions set forth in the notice to the employees and declined to accept a statement of desire in opposition to an application for certification where it was filed with a branch of the Department of Labour and not with the Board. The Board has required strict compliance with respect to the mandatory provisions of section 48 of the Rules of Practice. See the *Adventure Construction Limited* case, [1975] OLRB Rep. April, 371.

12. The respondent has referred to his employees' limited knowledge of the English language. In this regard the Board notes that the membership cards are in English, the Form 52, Notice to Employees of Application for Certification, Construction Industry, is in English and that the letter dated September 26, 1978 is in English.

13. Having regard to the foregoing considerations, the Board is not prepared to hold a hearing with regard to the matters raised by the respondent in its letter dated October 13, 1978. In addition, the Board finds that the letter dated September 26, 1978, is not a statement of desire which has been filed in accordance with the Board's Rules of Procedure.

14. The Board affirms its decision in this matter dated September 28, 1978.

0104-78-U Richard Mehringer and Elisabeth Misgeld, (Complainants), v. The Bob Miller Book Room Incorporated, (Respondent).

Section 79 – Interference with Trade Union – Evidence of employee meetings and other collective activity but no evidence of “trade union” activity – Discharges not motivated by anti-union animus or intent to frustrate possible organization – complaint dismissed.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members R. W. Redford and M. J. Fenwick.

APPEARANCES: *Richard Mehringer, Elisabeth Misgeld and Louie Douramakos for the complainants; Keith Billings, Robert Miller, Carol Vine and Martin Anavio for the respondent.*

DECISION OF THE BOARD; December 13, 1978

1. By letter dated July 18, 1978, the complainant, Richard Mehringer, requested that Elisabeth Misgeld be added as co-complainant, and the style of cause is amended accordingly.
2. The name “The Bob Miller Book Room Inc.” appearing in the style of cause of this complaint as the name of the respondent is amended to read: “The Bob Miller Book Room Incorporated”.
3. This is a complaint under section 79 of The Labour Relations Act.
4. The complaint alleges that Richard Mehringer and Elisabeth Misgeld were discharged by Paul D. Warner, Business Manager of the respondent, on March 30, 1978, contrary to the provisions of section 56, 58 and 61 of The Labour Relations Act.
5. Mr. Mehringer is a scholar and had been a candidate for a Ph.D. in German Literature at the University of Toronto before taking a job at the respondent's store. Ms. Misgeld is an M.A. in Psychology.
6. At the time of the discharge, Mehringer had been employed by the respondent for approximately two and one-half years. At the time of his discharge, he was being paid \$4.40 per hour. His starting rate had been \$2.65. Misgeld had been employed for approximately 8 months and was earning \$3.90 per hour on March 30, 1978. She had started at \$3.50 per hour.

7. The sections of the Act alleged to have been violated by the respondent in its treatment of Mehringer and Misgeld are the following: 56, 58 and 61.

8. During the course of the hearing, reference was made to section 79(4a) of the Act which provides:

On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

9. The respondent's position is that there had been no violation of the Act in the dismissal of Mehringer and Misgeld.

10. There is no doubt that the issues placed before the Board arose in the main out of a meeting of employees which occurred on or about February 14, 1978. The employees were notified of the meeting through a handwritten note posted on the bulletin board by Mehringer, which read:

Before a general staff meeting of board of directors and employees, I suggest we employees have a separate meeting of our own. Soon! If interested, see Richard.

Tentative date set:

Time: Feb. 14 6:30 p.m.
at Birdy's (Valentine Day)

11. There is a dispute as to whether this meeting was called as the result of Mehringer's initiative or whether the idea originated with the management of the company. It is common ground that Robert Miller, President of the respondent company, spoke to Mehringer in January of 1978 concerning a general meeting to be held between the staff and the management of the company later in the year. Miller's evidence was that there had been two prior general meetings of staff and management in which matters had been discussed back and forth. He said that he suggested to Mehringer that before the upcoming general meeting, it might be helpful if the staff first met on their own when they would feel more free to discuss matters before coming to the general meeting and thus be better prepared for that meeting.

12. Mehringer agrees that Miller advised him that a general meeting with the staff was overdue but that Miller did not suggest that the staff first hold its own meeting. It is obvious, in any event, that Miller raised the subject of a meeting and it was out of his initiative that the issues before us arose.

13. Following the conversation with Miller, Mehringer posted the notice referred to in paragraph 10 above. A meeting of the employees was held on February 14th. Both Meh-

ringer and Misgeld attended. Mehringer told the Board that he appointed himself as Chairman of the meeting. Mehringer kept notes of the meeting. A handwritten covering letter dated February 21, 1978 addressed to "Dear Bob et al" was filed as Exhibit 1. These documents had been posted on the notice board.

14. The text of the letter reads:

As the store has been in operating existence for over 2-½ years, we felt that the following recommendations should have evolved naturally, but due to the complacency of *both* the executive and the employees, the need has arisen for general consultation.

We feel that the recommendations in the attached minutes are reasonable and possible and would lead to a more efficient and happily run store.

Because all the information is present, we do not see any reason why there could not be a general meeting within the next two weeks (before the sale).

some of The Employee's
Committee for a Happy
Working Existence!

15. The "minutes" referred to in the letter were made by Mehringer. There is no evidence that they were ever adopted as minutes in the formal sense. They indicate that those in attendance, none of whom were managerial, discussed statutory holidays with respect to part-time employees; the mechanism for informing employees on business-related matters, in particular, profit or the lack of it; the suggestion that a non-voting representative of the employees attend executive meetings and the question as to whether wage demands were reasonable in view of business affairs. The realignment of wages, fringe benefits, including OHIP, pension plans and the possibility of employees purchasing books at cost were also among the matters discussed.

16. In addition, the minutes contain the following statements:

The meeting opened at 6:30 p.m. and closed at past 8. Present were: Richard Mehringer, Elisabeth Misgeld, Marc Smith, Cathy Vine, Marlene Warnick, Norman Warnick.

A notice on the bulletin board in the store had announced this meeting several days in advance. Peter Fraser communicated that he could not attend on that day. No effort at compromise was made. Barbara Boyce expressed interest in the meeting but had to be disqualified for reason of her belonging to the board of directors. Michael Mitchie, who had intended to come, apologized the day after, for having stayed away. There was no word from the rest of the employees.

The meeting opened with a statement of interest in our jobs, and in the

welfare [sic] of the firm, with the simultaneous assertion of our needs and an evaluation of our positions. The purpose of the meeting was to specify our points of view and their form of presentation.

Throughout the meeting, it was agreed by all present that any presentation at an eventual general staff meeting would emphasize our concern for the well being of the firm, and that our demands would be made in good faith and in friendly spirit, while, at the same time, we felt the need of verbalization.

Following the minutes dealing with statutory holidays referred to above, the minutes state:

At this point, it was argued, and agreed upon, that despite diversity of situations all points brought up shall be seen as representative of a group rather than of an individual. Strictly personal things should be brought forward by the person involved.

The assumed individual rates of employees were included in the minutes.

17. The minutes record that Norman (Warnick) was elected to speak for the employees at the general meeting with Cathy Vine as his assistant. The reason given for this selection was that Cathy Vine seemed to be a logical choice because she was a daughter of Carol Vine, one of the Directors of the company. Warnick had known Miller for a long time and it was thought they would make the best representatives. They also indicate that Richard (Mehringer) was to ask Bob (Miller) to call the general meeting. The minutes also bear a notation to the effect that on the morning of February 15, 1978, (that is, the morning following the employees' meeting), Richard asked Bob to set the date for a staff meeting.

18. Subsequent to the posting of the documents referred to above, Miller had a meeting with Warnick and Vine, at which time the three of them went through the minutes. Miller's evidence is that he discussed the question of statutory holidays with Warnick and Vine and told them he would look into it. They discussed the general financial situation. Miller said he would look into the matter of OHIP but indicated that he felt no obligation was on the company to pay. He said that he proposed that a general meeting be held after the annual sale in March. Following the posting of the letter and attached minutes, Miller posted a notice indicating that the minutes reflected individual grievances. It was his opinion that the meeting had resulted in raising disputes among the employees concerned. He said that the note had touched a sensitive nerve and had displeased Mehringer.

19. The general meeting took place on March 22, 1978. At this meeting the "minutes" formed the basic agenda for the discussion. In addition to dealing with some items on the agenda, Miller went into the overall financial situation and indicated that, among other liabilities, there was one of \$15,000 to \$20,000 claimed by the landlord. Mehringer, according to Miller, complained about the way the business was being conducted and stated that since the respondent is a corporation, there was no personal responsibility for the more than \$100,000 debts. Mehringer again, according to Miller, said that the respondent was more concerned about the landlord than about the staff. Mehringer also raised a question about "flex-time" being established as a policy and Miller pointed out that Mehringer had been using this method but that it was causing discomfort to the rest of the staff.

20. Mehringer said that his role in the matter changed during the course of the general meeting. He said he felt that the delegates were not effective and that they could not get specific answers. He said he felt that Warnick was not speaking out strongly enough and that it was time for him to say something productive. He then read a prepared speech. It is obvious from this that his speaking out was not as much of a change of role arising out of what he perceived to be a failure on the part of the delegates, as he indicated, but rather, that he had come prepared to make a speech of his own in any event.

21. The origination of the document is unclear and, as already noticed, it was not introduced during the complainants' evidence in chief, but during the cross-examination of Carol Vine. The heading, "The following words were presented by Richard at the general staff meeting of the Bob Miller Book Room on March 22, 78" would seem to indicate that it was not the original text. The witness perused the document and said it embodied part of the speech but that Mehringer had made other comments which were not reproduced in the document.

22. Mehringer told the Board that he could not get specific answers from the directors. He did, to use his word, "force" an answer with respect to the question of employees buying shares in the company. He said that Miller said this was possible in theory but that it would not be done. He also objected to the fact that Miller insisted on dealing with matters on an individual and not a group basis. Miller stated in his evidence that he felt he had the right to deal with the individual employees.

23. Following the meeting, a compromise date was set for a further meeting between the directors and the employees.

24. Sometime after the general meeting, the following notice was posted:

STAFF

Anyone wanting time off will ask Bob not less than one week in advance to see if it is feasible.

We would like to institute coffee breaks for everyone. Please give your work schedules to Rose so that she can make a plan for breaks.

The Directors

25. On March 30th Mehringer posted a response to the foregoing notice. The response reads:

Dear directors,

Your above note relates to one specific issue raised by us, first in writing on February 15 [point IV of the 'minutes'], then again, more than a month later, at the staff meeting on March 22.

At that time, you expressed your desire to further postpone a presentation of your stand on this and the other issues of the minutes [with the exception of one clear 'no' to point VII] to another meeting which is to take place, as mutually agreed, on Tuesday April 11.

Will you now, please, stick to this date and show *some* regard for your workers by deeming us worth an answer, before you introduce your measures. Thank you!

signed Richard (hoping to have spoken in the spirit of the employees and taking responsibility if I have not.)

The employment of Mehringer was terminated on March 31st.

26. During the later stages of Mehringer's testimony, the Board raised a question concerning the lack of evidence of union activity. It was following that query that Mehringer stated that he felt that sooner or later there would be a union. He said that he had phoned a union but had not left his name and just let the matter go for the time being. There was no time established as to when this took place, and certainly no evidence that such action was communicated to or had come to the knowledge of management.

27. Misgeld, whose testimony followed that of Mehringer, attended the staff meeting of February 14th and the general meeting of March 22nd. She described her duties as being to buy books, sell books and to make decisions as to what books were to be purchased. She said she was in charge of the social science department. Her evidence was that she played a major role in the affairs under review. This consisted of contacting the other employees about the meeting which Mehringer had called for February 14th through the notice. She said that she was no more active than others at the general meeting, but did raise a question concerning OHIP. Her testimony was that the purpose of the February 14th meeting was to form a group to confront management to the extent that they be informed that they were forming the first part of a union group. This, of course, goes far beyond anything Mehringer said in that regard. She also said that there was an intent to contact the Retail Clerks Union to ask for certification and to be unionized. She also said that they were prepared to call another meeting after the general meeting and call a union representative. Misgeld said that she saw no reason to inform the management of contact with the Retail Clerks Union which she said Mehringer told her he had made. She also was unable to say when this occurred.

28. She told the Board that after Mehringer had spoken to Miller, the former had consulted with her. She was unable to recall the date or hour but did remember it was in the back room. She also said she did not remember if he mentioned a union or certification. She indicated that she thought the employees had been unionized through the meeting and the condensation of the proposals into minutes.

29. Having in mind the reference by the Board to Mehringer's evidence with respect to union activity and his vague testimony in that regard, we are persuaded that much of Misgeld's evidence is self-serving and appears to be an attempt to feed the deficiency in Mehringer's evidence. A clear instance of this is that Mehringer testified that he appointed himself Chairman of the group. Misgeld, on the other hand, said that Mehringer had been elected Chairman and that this was not recorded in the minutes due to an oversight. The minutes, however, were prepared by Mehringer and not by Misgeld. She also stated that the note posted by Mehringer suggesting a meeting of employees said "it would be essential that the workers meet in a separate meeting". She said the note made no mention of a trade union but it indicated that "we had strong intentions". She could not recollect the wording but thought it used the word "workers". The text of the notice, which was later produced, has a somewhat different import as may be seen.

30. The latter testimony of Misgeld is an obvious attempt to introduce some suggestion of formality or organization of the employees into the picture. Cathy Vine, one of the spokesmen selected by the group and who was present at the February 14th meeting, said there had been no mention of a trade union, no mention of a formal organization of employees or of the adoption of a constitution, and no suggestion of contacting a trade union. In her evidence as to the purpose of the meeting, she said that she understood the meeting was for the purpose of allowing the employees to present their ideas about the running of the store. She said that the employees were not aware of their functions and wanted a more formal way of settling procedures. She stated that at a meeting the year before with the staff and the directors, nothing had been resolved and that the employees felt that they should know what they wanted so that the meeting would not be a flop.

31. There is, in any event, no persuasive evidence before the Board from which it would conclude that the employees had formed a trade union or, indeed, any viable organization at all. Counsel for the complainants argued, however, that the employees formed the nucleus of a trade union or were in the process of becoming a trade union when the employer interfered and crushed the movement before it could develop. The submission was that by his adverse action at this early stage, the employer had interfered with the exercise of "other rights under this Act" by Mehringer and Misgeld. Without deprecating, in any way, the general proposition underlying the argument, the Board finds that the evidence falls short of establishing a basis for its application to the present case.

32. It is quite clear that, while the documents, particularly the minutes, produced by the complainants of which the respondent had notice, contain references to the employees as a group and to a number of matters normally dealt with in collective agreements, they contain no reference to the formation of, or indeed the intent to form, a trade union. There was, of course, on the evidence, no direct, or indeed, indirect references made to a union in the discussions held between the employer and any of the employees.

33. It is obvious that the note posted by Mehringer in response to the coffee break notice caused a great deal of upset to Miller, who considered it insulting. It was the evidence of Carol Vine, one of the directors of the respondent company, that some of the employees had complained about Mehringer. Vine testified that the staff complained about working with him and that he had questioned the right of the board of directors to make decisions. She was of the opinion that Mehringer was causing a feeling of distrust on the part of the staff towards the directors. She said he indicated to employees that the directors did not know how to run the store and that there was money available which the directors were hiding.

34. Insofar as Misgeld is concerned, the reasons advanced for her discharge were that while she was in charge of the psychology section, she had shown she had no sense of organization and no patience with the clerical tasks involved in her work. She had been given an increase in pay some three weeks after she commenced to work but only because she had been offered a job elsewhere at a higher rate, which she felt she would have to take immediately unless she got an increase. The respondent's evidence was that the request came at a busy time in September when school classes had started and the respondent felt compelled to keep her on and so granted the increase. The management then felt obliged to increase Mehringer's rate accordingly, since both employees were in comparative jobs. It was also felt that this was unfair to the rest of the staff but that the management was caught at a bad

time and had no alternative. This act on the part of Misgeld appears to have created a sore spot with the management. There was, in addition, a difference of opinion between Miller and Misgeld as to how the files were to be organized. Miller acquiesced in the change of method suggested by Misgeld, although he said he did not like the change. He said that in March he went into Misgeld's section when she was away and found the files in disarray and had to spend time putting the files in order. Misgeld said that she had not been criticized by Miller, while Miller says that he spoke to her and she had replied that that was the way she wanted to work.

35. It was the respondent's evidence that these matters were all reviewed by the directors before the terminations were brought about.

36. It has been said many times that in cases such as the present one, the Board does not look to see if the employer had just cause for discharge, or even if the treatment afforded the complainant is fair but, rather, the Board looks to see if there is any taint of anti-union motive attaching to the actions giving rise to the complaints. If such a taint is disclosed by the evidence, the Board will direct remedial action, whether there be just cause for discharge or not.

37. In the present case, it is obvious that the proximate causes of the discharges were the repercussions from the meetings to which reference has been made. These, however, were not limited to the matters raised in the minutes but also awakened a general realization of the poor financial situation and a latent discontent with the internal organization of the staff and their duties – things to which Mehringer made reference to the chagrin and annoyance of the directors. One of those references which appears to have stung the directors and Miller, in particular, was Mehringer's reply to the directors of March 30th. It was also in evidence that the review of the overall situation by the directors, following the meeting with the staff, gave rise to an examination of the performance of Smith, an employee in the receiving department. It was decided that Smith had been seriously in danger of dismissal but that he had improved his performance considerably and would be retained.

38. Miller was asked in cross-examination if he was not afraid that what was going on amounted to the "conception" of a trade union. His reply was that the thought had never entered his mind.

39. Credence is lent to this response when it is considered that the impetus for the general meeting at least, if not that of the employees, came from Miller himself. Furthermore, it was Miller who selected Mehringer, who was in charge of a department, as the person to deal with the staff so that Miller would expect the latter to play a leading role. It is plain that the object of the general meeting was the same as in those held previously, that is, to discuss the whole project of the store and the problems of the staff. The contents of the minutes, therefore, were not surprising to Miller, although he said he thought the tone was. The minutes, in fact, dealt with the very matters for which Miller felt a meeting was overdue. In addition, some significance with respect to his views on the matter attaches to the fact that one of the spokesmen for the employees was the daughter of one of the directors of the company, and thus hardly one to suggest the presence of union activity.

40. In the result, the Board finds on the basis of the whole of the evidence that the respondent did not discharge the complaints contrary to the provisions of the Act.

41. The complaints are accordingly dismissed.
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0006-78-R Gerard Lafortune, (Applicant), v. Labourers' International Union of North America, Local 493, (Respondent), v. Corporation of the Municipality of **Casimir, Jennings and Appleby**, (Intervener).

Termination – Termination Application following acrimonious dispute and successful good faith bargaining complaint – Insufficient ground to decline to entertain application – Petition voluntary despite atmosphere

BEFORE: E. Norris Davis, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Steve Horton and Gerard Lafortune for the applicant; S.B.D. Wahl and M. Ross for the respondent; K. R. Valin, Armand Brisson and G. Gauthier for the intervener.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE: December 15, 1978

1. This is an application for termination of bargaining rights under Section 49 of the Labour Relations Act filed with the Board on April 3, 1978.
2. At the time of filing of the application there was no collective agreement in existence and more than one year had elapsed from when the respondent union was certified on January 25, 1977. It thus appears that the application falls under Section 49(1) and is filed on a timely basis: Counsel for the respondent however argues that the subsequent execution of a collective agreement on June 23, 1978 with effect from May 15, 1977 and from year to year thereafter requires that this application be treated under Section 49(2) of the Act and be found to be untimely.
3. It is the respondent's position that when the collective agreement was executed on June 23, 1978 pursuant to the Board's Order of June 9, 1978, the agreement was already in its second year of operation and because the execution of the agreement was after the first anniversary date of the agreement and subsequent to the time on which notice of renegotiation for renewal could be given, it must be treated as a two-year agreement under Section 49(2)(c). This is an interesting argument but, in our view, not one necessary for us to decide.
4. The critical date in respect to the timeliness of the application is the date it is filed with the Board. At that time, April 3, 1978, the union had been certified for more than twelve months and no collective agreement had been concluded so that there was then a clear right under Section 49(1) for an employee to bring an application. The fact that the respondent union and employer subsequently entered into a collective agreement, even though it might have an effective date prior to April 3, 1978, cannot be permitted to nullify the rights of employees under the Act which existed as of that date and which, by filing the instant application, they exercised. Whatever rights and liabilities flowed from the execution

of the collective agreement between the union and the employer, it is clear that the statutory rights of employees cannot be retroactively obliterated.

5. Nor are we persuaded by the argument that because the collective agreement signed June 23, 1978 came into existence at the direction of the Board that therefore the Board should deny the trial of an issue of representation which arose prior to the Board's direction in order to preserve the collective bargaining relation of the two principals. We are referred to a long line of cases commencing with *Trinidad Leaseholds* 52 CLLC 17005 as supporting the respondent's position. In our view, that line of cases explicitly recognizes the rights of all parties, trade unions, employers and employees to be equally protected and that stability and continuity in collective bargaining must be balanced against the right to have a question of representation tried. That line of cases holds, not that the issue of representation should be eliminated but, that once the representation issue has been tried it shall not be permitted to be again raised for a reasonable period during which the collective bargaining relationship will have an opportunity to flourish. In the instant case there is an outstanding question of representation which has not been tried and it should be tried.

6. In *The North American Plastics*, case [1969] OLRB Sept. 797, the Board rejected the argument that it should exercise its discretion to not entertain an application for termination of bargaining rights because it was alleged the Company had bargained in bad faith. It appears in that case that the bad faith bargaining allegations had not, as here, been demonstrated. Nonetheless, we believe the Board's reasoning in that case is applicable to the instant case and we adopt the Board's language where it is said,

"This, however is an application by employees and under the Act it must be dealt with on its merits and accordingly we are of the view that whether the Union or the Company acted contrary to the Act would not preclude the employees from proceeding in the usual course with their application."

7. The respondent raised a further preliminary objection that Lafortune's employment relationship with the intervening employer was not formalized as required by the *Ontario Municipal Act* and that he was not an employee under that Act, and therefore without status to bring this application. The Board ruled against this objection and now records the facts giving rise to the objection and its reasons for decision. It was established through testimony that:

(a) The applicant was hired by the intervener on January 6, 1978 as a mechanic and truck driver, and as of the date of first hearing herein, had worked steadily since that date, and he testified had been paid by the municipality.

(b) The Reeve, Mr. Armand Brisson, testified that Lafortune had been hired by Rene Chretien, Superintendent of Roads, that Brisson signed Lafortune's pay cheques and that Lafortune had not been laid off at any time. On cross-examination, Brisson stated that it was the practice of Council to pass a resolution ratifying that a man had been hired and in his words, "if Council wants to pass a motion it has the right to do so" but that to his knowledge Council was not required to do so in respect to hiring and laying off.

(c) Brisson testified that at the Council Meeting of February 23, 1978, resolution #84-78 was moved by LaFleur and Gauthier members of Council and passed the following language,

“That Council ratifies the action taken with respect to the layoffs of Gerard Lafortune, Remi T. Lalonde and Rheal Trudeau due to lack of work.”

Brisson testified that Trudeau and Lalonde were in fact laid off within a day or two of this resolution but that Lafortune was not, and that the layoffs had occurred because of a lack of funds, and were to be temporary although indefinite. Brisson explains Lafortune's retention as being because he was the only mechanic employed and there are always some emergency situations requiring truck repair and that work was then required to bring trucks up to government standards. The question was put to Brisson, “Is it not true that the reason Lafortune was not laid off was to enable him to bring this application?” and he responded, “That is not true” and the further question “A reason?”, he responded “No”.

(d) Both Brisson, the Reeve and Gauthier, the Deputy Reeve testified that the Superintendent did the actual hiring on orders of the Council as represented by the Reeve.

(e) Rheal Trudeau, a truck driver who had occupied the position of Road Superintendent until early January and was replaced in that position by Rene Chretien, testified that he had received a letter dated February 10, 1978 on the municipality's letterhead and signed by Chretien and by Brisson which read “Due to lack of work, please be advised that as of February 24, 1978 you will be laid off”. Lafortune testified that he had not received such a letter.

(f) Trudeau testified that as Road Superintendent he did not have the power to hire or to lay off or to recall from layoff but that such power was vested in Council. Trudeau further testified that he had no knowledge of the employment contract between Chretien, the present Road Superintendent and the Municipality.

8. The respondent union argues that all power to hire, fire, layoff and recall is vested in the Council by virtue of the Municipal Act and that the intervener had led no evidence that such powers had in fact been delegated in this case and that consequently the resolution “ratifying” the layoff of Lafortune must terminate Lafortune's active employment and any work subsequently performed cannot be found to be pursuant to an employment relationship.

9. If there was in fact a failure on the part of the Municipality's officers to comply (on which we make no finding) with the requirements of the Municipal Act in permitting Lafortune to continue at work despite the fact that Council had “ratified the action taken” which would result in his layoff, in our view that cannot be permitted to strip Lafortune of

his status as an employee for the purposes of The Labour Relations Act. The actuality of the situation is that Lafortune had been at work performing services for the Municipality without interruption and continued to be paid for those services under the same conditions and in the same manner after February 24, 1978 as he had been prior to February 24, 1978; he was aware of no change in his relationship with the Municipality and there were no outward evidences of any change. Further there was no evidence that the decision to not lay off Lafortune was in any way influenced by a motive on the part of the Municipality which might be improper under The Labour Relations Act.

10. It is our finding that for the purposes of The Labour Relations Act, Gerard Lafortune is an employee of the Corporation of the Municipality of Casimir, Jennings and Appleby in the bargaining unit affected by this application, and that, as such, Lafortune does have status to carry the application.

11. The bargaining unit we are here concerned with under Section 49(1) is that determined in the certificate, and which is:

“All employees of the Municipality working within the Township of Casimir, Jennings and Appleby, save and except non-working foreman and office staff”.

The respondent raises the challenge that certain persons are not included on the lists of employees prepared by the employer and that despite the fact that they have not actually been at work for some months prior to the application they remain as employees by virtue of the fact that there is no by-law of the Municipality in laying them off. For the same reasons, as noted above, it is our finding that the actuality of these persons not working outweighs the technical irregularities, if any, under the *Municipal Act* and such persons are not employees for the purposes of the Labour Relations Act.

12. An Examiner was appointed to enquire into the responsibilities and duties of the Roads Foreman and the Arena Manager. The report of the Examiner was made to the Board and the Board received the representations of the parties thereon, and the Board made an oral ruling at the hearing that both persons were employees for the purposes of the Labour Relations Act and included in the bargaining unit determined in the certificate.

13. Lafortune testified that he and two other employees talked about their relationship with the union at a roadside meeting which was continued at Lafortune's house. The upshot was that Lafortune would see a lawyer whom Lafortune picked, not because of previous business relationship, but because Lafortune had met and talked with him at court hearings where they had both been present and which Lafortune had attended in connection with automobile safety certificate inspections done by him. Lafortune subsequently received in the mail, from his lawyer, the form of petition now filed with the Board.

14. Lafortune testified that he personally signed the petition and secured the signatures of two other employees as a result of his visiting with them individually at their homes at night. He stated that he actually witnessed each of these signatures although he did not apply his own signature as a witness until a later date when requested to do so by his lawyer. The petition remained in Lafortune's possession at all times until turned over by him to his lawyer for forwarding to the Board.

15. He also testified that no employees had been approached at work, that he had had no discussions with Management relating to the matter, that the two visits to his lawyer had been during working hours for which he received permission to be absent and he was not paid for that time.

16. Tom Pothier, an employee in the bargaining unit was called by the respondent as a witness and testified that Lafortune had asked him to sign the petition during working hours and at a time when Pothier was working on road repairs. Pothier testified that Lafortune drove up in his own car – a black Chrysler – that he sat in Lafortune's car with him and Lafortune showed him "the paper" saying "I know you won't sign it but I have to ask you." Pothier when shown the heading of the petition at the hearing was unable to identify it as the document Lafortune had shown him because of his inability to see it without his eye-glasses. In cross-examination Pothier stated that the paper shown him by Lafortune was written in French and that he understood the difference between French and English.

17. The question had been put to Lafortune during cross-examination and prior to Pothier being called as follows:

Q. Did you ask Tom Pothier to sign?

A. Yes.

Q. At work?

A. No.

Lafortune was recalled and gave the following evidence:

Q. Did you ever drive up in your Chrysler and present Pothier with papers?

A. No. I don't have a Chrysler.

Q. Did you have one in past year?

A. Not this year – last year.

Q. What do you drive?

A. A Ramcharger.

Q. A truck?

A. Yes.

Q. When did you get it?

A. In July 1977.

On balance the Board accepts Lafortune's testimony that he had never asked Pothier to sign

the petition during working hours. If you accept Pothier's own evidence that the paper shown him in the "car episode" was written in French, then obviously it was not the petition filed with the Board. We accept Lafortune's evidence regarding his automotive vehicle ownership and can only conclude that Pothier was mistakenly confusing different incidents.

18. The Board finds that at the time the application was made there were six employees in the bargaining unit determined in the certificate, and that not less than 45% of the employees in the bargaining unit had voluntarily signified in writing on the terminal date that they no longer wish to be represented by the respondent trade union.

19. The Board directs that a representation vote be taken of the employees of Corporation of the Municipality of Casimir, Jennings and Appleby. Those eligible to vote are all employees of Corporation of the Municipality of Casimir, Jennings and Appleby in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

20. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Corporation of the Municipality of Casimir, Jennings and Appleby.

21. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent.

2. This is an application for termination of bargaining rights brought under section 49 of The Labour Relations Act. It is therefor incumbent upon the applicant to demonstrate affirmatively that 45% of the employees in the bargaining unit have *voluntarily* signified that they no longer wish to be represented by the Union. As is usual in these cases the Board was presented with a petition circulated during working hours by an employee in the bargaining unit. A number of other employees signed this petition. The question for us to determine is whether in so doing they were acting voluntarily or because they felt that their refusal to do so would be communicated to the employer and would prejudice their employment relationship. The issue therefor is not whether there was actual management involvement in the circulation of the petition in support of the termination application; the issue is whether an employee could reasonably believe that his refusal to sign the petition could come to the attention of management with adverse consequences to himself. (For two cases in which a mere *reasonable appearance* of management involvement was sufficient to cast doubt on a petition or on Union membership evidence, see; *Dad's Cookies Limited* [1976] OLRB Rep. Sept. 545; and *Veres Wire Ltd.* [1976] OLRB Rep. July 337).

3. In determining whether a statement in opposition to a trade union is voluntary, the Board must have regard to the context in which the employee expression in opposition to the union was solicited. As the Board noted in *Morgan Adhesives* [1975] OLRB Rep. Nov. 813;

"The Board, however, must be guided by the overall environment in the workplace and the cumulative impact of events. In a not inconsider-

erable number of cases, the Board has found on the basis of the cumulative effect of the evidence before it, that unintentional acts or tacit behaviour by management served to create a "climate" which thwarted voluntary expression."

4. What then is the environment in this case? The Union was certified on January 25, 1977. Thereafter, the employer engaged in a calculated and determined effort to frustrate the rights of its employees and avoid its obligation under the Act. This anti-union campaign included an unsuccessful application for reconsideration, two unsuccessful applications for judicial review and a bitter strike. Throughout this entire period the employer adamantly refused to enter into a collective agreement and only did so after the Board found that it had breached its legal obligation to bargain in good faith. All of this effort and perhaps thousands of dollars of the taxpayers' money was expended to avoid signing a collective agreement which would clearly set out the wages and working conditions of the half dozen or so employees who worked for the municipality! In addition, we have evidence of a rather curious pattern of persons being laid off for lack of work, others being retained or hired, and Mr. Lafortune being officially laid off, but not in fact laid off.

5. In this atmosphere of job insecurity and blatant employer opposition to trade union, what would a reasonable employee do when he is asked to sign a document repudiating the trade union – especially when it is evident that that document has not been drafted by the employee circulating it. In my view, the answer is obvious: he would sign the statement in opposition for fear that if he did not do so his support for the union would be communicated to the employer and the employer's obvious antagonism to the union and all its supporters would be directed against him. This would be a perfectly reasonable reaction, in these circumstances, having regard to the hostility which this employer has exhibited since its employees first sought to organize and bargain collectively.

6. In the result therefor, for the reasons set out above, I am not persuaded that the petition in support of this application represents the voluntary wishes of the employees. Accordingly, I would have dismissed the application.

1905-77-R Service Employees Union, Local 204, Affiliated with the S.F. of L., C.I.O., C.L.C., (Applicant), v. **Chelsey Park Nursing Home**, (Respondent).

Certification – Employee – Whether subject employees exercise managerial functions

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Tom Christou and Joe Aggimenti for the applicant; R.J. Drmaj for the respondent.*

DECISION OF THE BOARD; December 1, 1978

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that all office and clerical employees of Chelsey Park Nursing Home in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements, constitute a unit of employees appropriate for collective bargaining.

4. The respondent nursing home has challenged the status of the only two persons falling within the above described bargaining unit, Ms. Joanne DeMontbrun and Ms. Dorothy Pelly. It is the respondent's position that these two individuals are employed in a confidential capacity in matters relating to labour relations and therefore should be excluded from collective bargaining under section 1(3)(b) of the *Labour Relations Act*.

5. Section 1(3)(b) of the Act reads:

“1(3) Subject to section 80, for the purposes of this Act, no persons shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

The purpose of this section is to exclude from collective bargaining those persons who if found to be employees for the purpose of the Act would be confronted with a conflict of interest as between the employer and the bargaining unit caused by the person's access to confidential information relating to the employer's labour relations. The Board has consistently found that for an individual to be excluded from the operation of the Act on the basis of being employed in a confidential capacity there must be “a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interests of the employer ...”. An incidental or isolated involvement in some aspect of labour relations is not sufficient to exclude a person from collective bargaining (see *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379 at p. 388). As well, mere access to confidential information that may pertain to labour relations is not by itself sufficient to exclude an individual from collective bargaining, nor is the mere knowledge of matters which are confidential in the sense that the employer would rather not have information of such a nature divulged to employees e.g. payroll or employment application information. (See *York University*, [1974] OLRB Rep. Dec. 945 at p. 951 and the cases cited therein.)

6. Ms. Joanne DeMontbrun is the receptionist at the Chelsey Park Nursing Home and is charged with doing the payroll once every two weeks. Among a collection of other duties, Ms. DeMontbrun does all of the typing for the home. Over the last three years, Ms. DeMontbrun has typed warnings, notices of dismissal, a report of the company's investigation of an incident of misconduct containing the results of the investigation and the company's decision with respect to the appropriate discipline, job evaluation forms and replies to grievances. In addition, when a group of employees from the nursing home applied for cer-

tification in the spring of 1978, Ms. DeMontbrun typed the letter to the Labour Relations Board enclosing the necessary documentation accompanying the reply to the application for certification and was responsible for typing the employer's schedules containing the names of those employees who, in the employer's view, fell within the bargaining unit described by the applicant. Ms. DeMontbrun also typed letters to legal counsel in connection with this application for certification.

7. The amount of time spent by Ms. DeMontbrun in typing letters and documents relating to the employer's labour relations constitutes a small percentage of her total work. The testimony reveals, however, that while grievances, applications for certification, incidents requiring discipline and occasions for employee evaluations may be infrequent occurrences, it is her regular responsibility to type this kind of material. Some of the labour relations material typed by Ms. DeMontbrun and noted in evidence was done under the old administration at the nursing home. Ms. DeMontbrun testified, however, that her duties have undergone no significant alteration and that if any such matters arose under the new administration she would be the one called on to do the necessary typing.

8. Having regard to all the evidence, the Board is satisfied that Ms. DeMontbrun has a regular, material involvement in matters relating to labour relations and that the material is of such a nature that, if disclosed, would adversely affect the interests of the employer. Accordingly, in view of the totality of the evidence the Board finds that Ms. DeMontbrun is employed in a confidential capacity within the meaning of section 1(3)(b) and is therefore excluded from the coverage of the Act.

9. Ms. Dorothy Pelly, the other individual in the bargaining unit, is the bookkeeper for the nursing home. Her duties involve tending to some, though not all, of the home's accounts payable which are sent from her to the employer's head office for payment. She takes care of the patients' accounts and receipts, prepares bank deposit slips, fills out forms relating to OHIP and group insurance, is in charge of the petty cash and sorts mail. At one isolated time in the past, Ms. DeMontbrun helped in the preparation of the budget for the new administration. The testimony reveals that her role in the preparation of that budget was solely based on her ability to give assistance to the new administration during the period of transition because of her experience in the home and the monthly records she had kept for the former administrator. Any further role in the preparation of the budget is most unlikely to occur. Furthermore, the new administrator's request for her help in reading one of the home's operating statements was of a similar, isolated nature.

10. Having regard to all of the evidence of Ms. Pelly's duties and responsibilities and the criteria that the Board uses as outlined above, the Board finds no evidence of a regular, material involvement in matters pertaining to labour relations and therefore does not find her to be excluded under the provisions of section 1(3)(b) of the Act.

11. There were only two individuals falling within the bargaining unit. The exclusion of Ms. DeMontbrun from employee status leaves only one employee in the unit. Having regard to the provisions of section 6(1) of the Act, the Board is unable to certify the union with respect to the bargaining unit applied for in this application.

12. Accordingly, the Board dismisses this application for certification.

ADDENDUM, BOARD MEMBER O. HODGES:

1. Although the Board is unable to certify the trade union for the unit applied for, it is within the power of the parties to this application to ensure Ms. Pelly the benefits of collective bargaining. The parties have two subsisting collective agreements between them covering other employees of the respondent and they may by agreement extend the scope of one or the other of these agreements to include Ms. Pelly.

0790-77-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Dominion Dairies Limited**, (Respondent), v. International Union of Operating Engineers, Local 796, (Intervener).

Certification – Constitutional Law – Employee – Whether subject employees are dependent contractors – Casual hiring of helpers relevant but not determinative – Provincial jurisdiction found although products delivered to Quebec

BEFORE: M. G. Picher, Vice-Chairman, and Board Members M. J. Fenwick and J. D. Bell.

APPEARANCES: *Harold F. Caley, Stan Millar and Phil Wolfeden for the applicant; D. W. Brady, Keith McGillvray, Grant Gillard, Duncan Valliere and W. S. Challis for the respondent; no one appearing for the intervener.*

DECISION OF THE BOARD; December 6, 1978

1. This is an application for certification.
2. The applicant seeks bargaining rights for all employees of the respondent's dairy in the City of Ottawa who are engaged in delivering its products as contractors or franchised dealers. The respondent submits that the application should be dismissed on three separate grounds. Firstly, it submits that this Board is without constitutional jurisdiction in the labour relations of the respondent and the persons in question. Secondly, it submits that the applicant union bargained away the right to represent the individuals concerned in an agreement made with the respondent some years ago and that the applicant should therefore be estopped from bringing this application. Lastly, the respondent submits that the persons in question are independent contractors and as such are not employees within the meaning of The Labour Relations Act and cannot, therefore, be the subject of a certificate of this Board.
3. The Board appointed a Labour Relations Officer to inquire and report back to the Board on the list and composition of the bargaining unit. At the time of the examinations conducted by the officer there were nineteen contractor-drivers in the service of the respondent. Twelve of them were examined and their evidence was put before the Board in the form of an interim report of the Labour Relations Officer. Upon hearing the representa-

tions of counsel for the respondent the Board determined that it would issue an interim decision which would be binding as it relates to the twelve owner-drivers examined. It became apparent that certain material facts may differ from driver to driver and that if the parties cannot agree as to the status of the seven contract drivers not examined further examinations might be necessary. It is hoped that further examinations will be avoided, or at the least abbreviated, in the light of the principles canvassed in this interim decision. Any interim decision with respect to the employment status of the twelve owner-drivers would issue, of course, only in the event that the first two objections to this application raised by the respondent were not successful.

4. We turn then to the first objection raised. The respondent submits that the owner-drivers are engaged in an inter-provincial undertaking within the meaning of section 92(10)(a) of the *British North America Act*. Thus the respondent contends that its labour relations with the owner-drivers are exclusively within the legislative competence of the Parliament of Canada and that it cannot be regulated in that regard by The Ontario Labour Relations Act.

5. This Board can only exercise jurisdiction which is lawfully conferred upon it by the Legislature. *Prima facie* labour relations fall within the legislative competence of the province as being within the enumerated jurisdictional head of property and civil rights within section 92(13) of the *British North America Act*. (*Toronto Electric Commissioners v. Snider* [1925] 2 D.L.R. 5 (P.C.)). The labour relations of any federal work, undertaking or business are, however, within the exclusive jurisdiction of the Parliament of Canada and are regulated under section 108 of the Canada Labour Code (R.S.C. 1970, c.L-1, re-enacted by S.C. 1972, c. 18, s.1). The heading of federal undertakings material to this application is found in section 92(10)(a) of the *British North America Act* which provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, —

10. Local Works and Undertakings other than such as are of the following Classes: —

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

That section of the *British North America Act* and its interpretation by the courts require the Board to carefully examine the nature of the business or undertaking engaged in by the respondent. If the respondent's business is within the definition of section 92(10)(a) of the *BNA Act* then its labour relations are exclusively regulated under the Canada Labour Code.

6. The words of section 92(10)(a) have been interpreted as applying only to "means of inter-provincial communications" (*C.P.R. v. Attorney-General of British Columbia* [1950] 1 D.L.R. 721 (P.C.)). The fact that a business extends beyond a province will not mean that the operations of such a business will come within federal jurisdiction unless the business involves transportation or communication. In the *C.P.R.* case (*supra*), Lord Reid stated:

“There are many companies beside the appellant whose businesses extend over all or most of the Provinces. It was not and could not be suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies.” (p.727).

7. When a company carries on a single undertaking which is fairly characterized as inter-provincial communications or transportation it is well settled that its activities are regulated by federal jurisdiction within section 92(10)(a) of the British North America Act, (*Attorney-General of Ontario v. Winner* [1954] A.C. 541 (P.C.)). The characterization of the undertaking is not, of course, an “all or nothing” proposition. The courts have recognized that a company may be engaged in more than one undertaking and that certain aspects of its business may be regulated federally while other aspects fall within provincial jurisdiction. In the *C.P.R.* case the Judicial Committee of the Privy Council determined that although the Empress Hotel in Victoria was owned and operated by the Canadian Pacific Railway, the operation of the hotel was sufficiently distinct and unrelated to the corporation’s rail-roading endeavours as to be subject to provincial regulation of the hours of work of the hotel’s employees. Counsel for the respondent submits that the severability doctrine enunciated in the *C.P.R.* case applies in the instant case. He argues that the trucking and delivery component of the respondent’s business are sufficiently separate from its manufacturing activity that the labour relations of employees engaged in trucking and delivery are exclusively within federal jurisdiction.

8. In the past this Board has been required to determine whether a manufacturing operation with trucking facilities would be held to be one undertaking and, if so, whether it would be subject to provincial or federal regulation. When a company operates as a common carrier and its business takes it beyond provincial boundaries its labour relations are exclusively under federal jurisdiction. (*Re Tank Truck Transport Ltd.* (1960) 25 D.L.R. (2d) 161 (Ont. H. Ct.)). Where, however, a company is not a common carrier and the essence of its business is manufacturing or processing, the undertaking is within the constitutional jurisdiction of the province for the purposes of regulating its labour relations, notwithstanding that the goods manufactured or processed by the company are sometimes sold outside the province and that the company’s delivery facilities extend that far. In other words, where the activity is essentially one of manufacturing and where the manufacture and delivery of goods are integrated activities which are part and parcel of the company’s total undertaking, the labour relations of all employees of the company fall within provincial jurisdiction. (*Wm. R. Barnes Company, Ltd.* [1967] OLRB Rep. Sept. 566; *Domtar Limited Trucking Division* [1970] OLRB Rep. July 495; *Crane Carrier Canada Limited* [1970] OLRB Rep. Sept. 665; *Compagnie Miron Ltee.* [1972] OLRB Rep. Dec. 1034 and [1973] OLRB Rep. Jan. 61; *Mason Windows Limited* [1973] OLRB Rep. Oct. 547; *F.B.I. Foods Ltd.* [1975] OLRB Rep. June 522; *Catalano Produce Ltd.* [1975] OLRB Rep. Oct. 743). In the instant case, therefore, the issue is whether the trucking and delivery aspect of the respondent’s business is sufficiently integrated with its food processing activity as to form part of one undertaking or whether it is severable from the manufacturing component so as to be subject to federal regulation.

9. Counsel for the respondent submitted that in assessing its constitutional jurisdiction the Board must focus on the enterprise of the owner-drivers as a group rather than on the nature of the enterprise of the respondent. We do not agree. Firstly, the contractors, whether or not they are dependent upon the respondent, are independent of each other and

can scarcely be described as being engaged in a single enterprise. They have nothing in common apart from their mutual relationship to the respondent's enterprise. If the contractor-drivers are employees within the meaning of The Labour Relations Act, the question is whether the respondent is engaged in an undertaking that falls exclusively within federal jurisdiction. The enterprise to be examined, therefore, is the business of the respondent, taking into account the relationship of the contractor-drivers to that business.

10. In its reply to this application the respondent described its business as "Manufacture of dairy products". The respondent operates a plant on Cooper Street in the City of Ottawa. At that location it processes, packages, and ships milk products. It has some 77 employees working in the plant, 51 engaged in manufacturing and 26 in shipping; all of those employees are represented for collective bargaining purposes by a trade union which obtained its bargaining rights through a certificate of this Board.

11. The respondent's dairy products are distributed directly to stores on a wholesale basis or to homes on a retail basis. Some six percent of its products is distributed by the contractor-drivers who are the subject of this application. Seventy-nine percent of its product is distributed in Ontario and twenty-one percent is distributed in the Province of Quebec. The only distinction in the product which goes to Quebec at the time of the examination was metric labelling which appeared on the packaging marketed in that Province. Some 60 trucks are engaged in delivering the respondent's dairy products both in Ontario and Quebec, in what may be described as the Ottawa Valley region. The trucks fall into three categories: sixteen of them are driven by the salaried employees of the respondent, twenty are owned and driven by the contract drivers who are the subject of this application and the balance are owned and driven by some five private distributors each of whom operates a number of trucks on a contract basis with the dairy. The group of large multi-truck distributors are not a part of this application.

12. The sixteen salaried drivers employed by the respondent are also not a part of this application. They are represented in a separate bargaining unit by the applicant pursuant to a collective agreement after certification by this Board. Those drivers service nine milk routes in Ottawa, and two in the City of Hull. They also drive four ice-cream delivery trucks, three of which deliver in Ottawa and one of which delivers ice-cream in the Province of Quebec. There is a further truck, driven by a salaried employee, described as a "spare" which is licensed for both provinces and services any area as required.

13. The bulk of the product distributed by the respondent is processed at its plant on Cooper Street in Ottawa, including milk products, orange juice and lemonade. Certain dairy by-products which it sells under its brand name are not. Yogurt, cottage cheese, sour cream and dips are supplied to the respondent from its plant in Toronto and its brand name ice-cream comes from its plant in Montreal.

14. Having regard to the evidence the Board is satisfied that the processing and sale of food is the nature of the respondent's business. It is engaged in dairying, an undertaking that, in the contemporary marketplace includes the processing, distribution and sale of milk, a broad range of milk by-products and citrus juices. The respondent's distribution system through its employee drivers and franchised drivers is integral to its functioning as a dairy. While its system of delivery has gained considerable sophistication since the day of the milkman's horse, it is, nonetheless, dedicated to the same end and remains intrinsic to the overall endeavour of dairying.

15. It would strain reality to attempt to describe the Dominion Dairy as engaged in two separate businesses, one being food-processing and the other being the operation of an inter-provincial trucking business. The respondent is not a common carrier and the trucking aspects of its business have no meaning or function apart from the furtherance of its business as a dairy. For the purposes of constitutional law its distribution and delivery function cannot be seen as separate and distinct from its essential undertaking as a dairy. And the fact that the respondent's products are marketed across inter-provincial boundaries does not alter the essential nature of its business. It is, therefore, not a federal undertaking within the meaning of section 92(10)(a) of the *British North America Act*. For these reasons the Board finds that it has jurisdiction to entertain this application.

16. We turn now to the respondent's second objection. It submits that the applicant should not be allowed to make this application by reason of the history of the relationship between the parties. Prior to 1970 the delivery work now performed by the contractor-drivers was performed by drivers who were employees of the dairy. In fact a good number of the present contract drivers were employees engaged in delivery work at that time. In 1970 the respondent decided that a portion of its wholesale and retail sales should be made through the intermediary of franchised contractor-drivers and that its employee drivers should be reduced in number and restricted to making wholesale deliveries. The proposition, simply put, was that a portion of the employee drivers would take over their routes, their trucks and their customers as franchised contractors. At that time the employees in question were represented for collective bargaining purposes by the applicant union. Initially the union opposed the employer's scheme, but through a series of meetings an accommodation was reached. The applicant continued to represent the employee drivers through a collective agreement. Employee drivers who became contractor-drivers were not subject to a collective agreement but they continued to be members of the applicant and continued to have the advantage of their union benefits and pension plan. By agreement the respondent continued to make its contributions to the union's benefit and pension plan on behalf of the contractor-drivers as it had done in the past. That arrangement has continued until this day.

17. The respondent submits that by participating in that arrangement the applicant has bargained away its right to represent the contractor-drivers and should be estopped from making this application. Counsel for the respondent referred the Board to the approach to this issue taken by the Manitoba Labour Board in re *Construction and General Labourers Local Union 1157 & Manitoba Labour Board* (1977), 82 D.L.R. (3d) 11 (Man. C.A.). In that case the Court of Appeal deferred to the jurisdiction of the Labour Board which dismissed an application for certification. The Court did so having particular regard to the Board's authority in certification applications to consider "any other matters that seem to the Board to be relevant to the matter before the Board". In that case the Board held a union to its undertaking with an employer that it would not apply for certification. This Board does not have the kind of discretion regarding "other matters" granted to the Manitoba Board in respect of considerations which may be brought to bear on an application for certification.

18. This Board has, moreover, noted that the parties are not competent to contract out of the provisions of the Labour Relations Act (*Whitney Maintenance Limited* [1973] OLRB Rep. Jan. 26). For this Board to enforce the undertaking of a trade union to forbear from exercising its right to apply for certification as the bargaining agent of a group of employees would appear to be contrary to the public policy expressed in section 3 of The La-

bour Relations Act whereby every person is free to join a trade union of his own choice and to participate in its lawful activities. Secondly, the Board is not satisfied on the evidence before it that what transpired in 1970 would, in any event, give rise to an estoppel. At that time the respondent made a unilateral decision to change part of its delivery system by contracting out delivery work theretofore performed by employee drivers to a group of franchised drivers. It was then applying in Ottawa what it had already done in its Toronto operation. The attempt of the union to respond to that decision by reaching an accommodation in the interests of its members was nothing more than an understandable attempt to protect the employees concerned, as through the continuation of their pension and benefits plan. The union's efforts to minimize its losses in the face of the employer's unilateral decision can scarcely be characterized as an agreement or a course of conduct giving rise to an estoppel.

19. We deal lastly with the issue of the employment status of the contract drivers who were examined. The respondent submits that they are not dependent contractors within the meaning of section 1(1)(ga) of The Labour Relations Act and are therefore not employees entitled to be represented by a trade union under the Act. The issue, therefore, is whether the persons in question, notwithstanding that they are not under a contract of employment and that they furnish their own vehicles, perform services for the respondent for compensation in a relationship giving rise to an economic dependence upon the respondent and an obligation to perform work for it, so that their relationship more closely resembles the relationship between employer and employee than it does the relationship between the parties to an independent contract.

20. As the Board has already noted, a number of the contract drivers examined were employees of the respondent prior to 1970. At that time they delivered milk and milk products to retail outlets and private homes on a number of routes assigned to them by the dairy. Their daily routine at that time was not markedly different from what it is now. They loaded their trucks at the respondent's depot in the morning, as they now do, and made their deliveries in the course of the day. Before 1970 the employee drivers were paid on a percentage basis calculated on the volume of their sales. Now they purchase their product from the dairy. That is done by filling out a load sheet at the end of a day for the next day's deliveries with each driver paying the dairy once a week for that week's product.

21. It is the responsibility of the driver to estimate the amount of product he should purchase to satisfy the orders of customers. But while the written contract between the drivers and the dairy limits the dairy's obligation to accept returned goods at one percent of the product purchased by the drivers, in practice the dairy accepts all returns and has credited the drivers for the purchases in question where returns have exceeded one percent of their volume of purchased product.

22. Customers serviced by the drivers may be either cash customers or customers described as "office accounts". Cash customers deal directly with the driver, paying him cash on delivery on a day-to-day basis. With "office accounts" the dairy bills the customer once a week and payment of those accounts is made directly to the dairy. The driver merely turns in the bill for his office accounts on a daily basis and is paid by the dairy for the full amount of the sale.

23. The decision as to whether a customer may become an account customer, dealing on a credit basis directly with the dairy, is the decision of the dairy. When a contract driver

passes on a request of that kind to the dairy it is the respondent's sales and credit personnel who decide whether the applicant's credit rating makes them acceptable as an office account or whether they must deal with the driver as a cash customer. There is evidence that on occasion drivers have extended their own credit to cash customers but now they rarely, if ever, do so having occasionally, as they put it, "got burned" by defaulting customers.

24. While there is some suggestion in the evidence and in the representations of counsel that the drivers have some leeway in what they charge customers for the sale of the dairy's product, the evidence is that the contract drivers always charge according to the suggested retail price list supplied to them by the respondent. They have no input into the determination of the suggested retail price and it appears that if they deviate from that price on sales to office account customers the respondent adjusts the amount charged to reflect its suggested retail price when it invoices the credit customer for the purchase in question. The drivers do not advertise and do not initiate promotion specials on the product they deliver. That is done by the dairy and all but one of the drivers examined indicated that they consistently pass on promotion specials to customers in the form of price rebates. On the whole, therefore, the evidence is clear that the pricing of the milk products delivered by the contract drivers is, in effect, controlled by the respondent dairy. In that respect the relationship between the contract drivers and the dairy has not changed since the days, prior to 1970, when the drivers in question were employees. It is, moreover, understandable that the respondent should control the prices charged by the contractor-drivers, particularly on sales to retail stores, when the respondent simultaneously sells its product directly to other retail stores through its own employee drivers. That is both a reason to control the price and a mechanism for doing so.

25. Customer relations are not entirely confined to the relationship between the contract drivers and the customers they service. In this area as well the dairy plays a substantial role. Its contractor supervisor acts in many respects as a liaison between the drivers and customers. While some customer requests or complaints are made directly to the contract drivers, a substantial number of them are directed to the dairy's supervisor who then brings them to the attention of the driver in question. And while new customers are sometimes obtained by the drivers themselves, it appears that the greater number of new customers approach the dairy directly and are assigned to one of the contract drivers' routes by the respondent's contractor supervisor. The same individual co-ordinates changes in customers and routes among the contractor-drivers.

26. The written contract between the dairy and the drivers examined described the customers as being the dairy's and not the drivers'. While the terms of that contract are not determinative of the drivers' status, they can be an indication of the relationship between the parties. In its reference to the customers the written contract appears to reflect the reality that flows through the evidence. One of the drivers examined testified that if a customer is unsatisfied with the service provided by a particular contract driver the company endeavours to keep the customer by reassigning his account to another contract driver. Thus while the contract drivers are free to expand or contract their routes they do so in large measure through the co-ordinating hand of the dairy. A driver's earnings depend directly on the size and number of customers he services. Thus the dairy exerts a control over the quality of service provided by the contract drivers through its ability to transfer accounts out of the hands of a contract driver who does not perform satisfactorily.

27. The contract drivers own their trucks, many of them having purchased their first truck from the dairy when the drivers changed from being employees to contractors in 1970. The drivers pay for the purchase and maintenance of their trucks and the refrigeration units in them. The dairy requires that the drivers carry a minimum of \$300,000 in public liability insurance on their vehicles. The contract drivers' trucks are all painted in the respondent's "Sealtest" colours and bear the "Sealtest" logo. The company provides the drivers with the money to paint their trucks and with the necessary company decals. While the drivers purchase their own motor vehicle licenses the dairy pays for the municipal peddler's licenses which they need to operate in Ottawa and Hull. The contract drivers also wear Sealtest uniforms provided by the respondent. The respondent also pays workmen's compensation premiums on behalf of the contract drivers.

28. All of the contract drivers make some use of helpers on their routes, just as they did when they were employee drivers prior to 1970. Some of the helpers are as young as twelve years old and frequently they are the son or nephew of the driver they help. Helpers are usually employed on Saturdays and some are hired during the summer vacation period. Eleven of the twelve drivers examined have only one truck and nine of those use an occasional helper. Three of the twelve drivers examined employ a helper on a steady, day-to-day basis. Contract driver Jean Quesnel, who has one truck, testified that recently he had to hire someone to replace him while he was sick, and that while he is now back on his route he uses a steady helper, whom he pays \$80 per week, because of the great number of stairs on his route. Real Carrière, who also has only one truck, also testified that he makes use of a helper to help him do his route every day.

29. One of the drivers examined, Mr. Leo Lanoue, has two trucks. At the time of the examination he employed two people on a full-time basis to drive both trucks on different routes. Those persons are not contract drivers with the respondent.

30. All of the contract drivers derive virtually 100 percent of their income from their work on behalf of the respondent. They carry and sell only the respondent's products. The only exception is one driver, Mr. Leo Marion, who also sells some of his customers eggs and margarine which are not supplied by the respondent. In the Board's view that incidental variation and the negligible portion of total income that it represents is not sufficient to distinguish the driver in question from the other contract drivers. The fact is that they are all dependent on the respondent for virtually all of their income.

31. Having regard to all of the evidence the Board is satisfied that all of the contract drivers examined, with the exception of one, are dependent contractors within the meaning of section 1(1)(ga) of The Labour Relations Act. When the totality of their relationship with the dairy is examined it is in many respects the same as it was when they were employee drivers prior to 1970. The nature of the work, the customers, supervision and co-ordination on the part of the dairy and the product handled are in all material respects the same. The only significant changes involve the transfer of the ownership of the trucks and the method of remuneration. The drivers are still engaged in the delivery of the respondent's milk products to its customers and for its benefit. While they do have some freedom to alter the composition of their routes the drivers effectively do so through the co-ordinating authority of the respondent. They work under the constant control of the respondent to the extent that it has the final word as to which customers they will or will not service. They wear the respondent's uniform and drive trucks of the respondent's colours containing products

processed at the respondent's plant in Ottawa or shipped from the respondent's facilities in Toronto. When all of these elements are viewed together the Board finds that, with one exception, the contract drivers more closely resemble employees of the respondent than they do independent contractors or independent distributors.

32. The exception from the Board's finding is Mr. Leo Lanoue. Mr. Lanoue owns and operates two trucks. The trucks are used to service separate routes on a full-time basis. Normally he drives one and his son drives the other, but at the date of examination he was not active on the trucks, and both were being driven by persons employed by Mr. Lanoue. In its decision in *Canada Crushed Stone* [1977] OLRB Rep. Dec. 806, the Board noted that the dependent contractor provisions of The Labour Relations Act do not extend the protection and benefits of collective bargaining to persons who are themselves sufficiently entrepreneurial as to be substantially engaged in deriving profit from the labour of others. While the Act has been extended to protect persons in a position of economic dependence whose whole endeavour is analogous to wage earning, it does not extend to give the added strength of collective bargaining to contractors who are substantially engaged in an entrepreneurial undertaking with a view to the pursuit of greater profit through the employment of others.

33. The line between contractors whose activities are more closely analogous to those of a wage earner, so as to make them dependent contractors, and contractors who are sufficiently entrepreneurial as to be excluded from that definition is not easy to draw. It can only be drawn in the light of the facts of each particular case. In *Canada Crushed Stone* the Board found that a contractor who owned 10 trucks which were driven by seven employees in an aggregate material hauling business that grossed \$250,000 per year was not, by virtue of the entrepreneurial nature of his business, a dependent contractor within the meaning of the Act.

34. In a more recent decision, *Comfort Guard Services Ltd.* (Board File No. 2007-77-R, as yet unreported, Oct. 6, 1978) the Board found that a heating equipment service contractor was not deprived of status as a dependent contractor merely because he sometimes made use of a helper on his service calls. In that case the Board determined that the use of a helper merely to lighten the serviceman's load was to be distinguished from the use of an employee hired on a regular basis to drive a second vehicle and make separate service calls, thereby substantially increasing the contractor's capacity for profit.

35. When the Board is faced with the question of the effect of the use of paid help by a contractor it must determine whether, in the light of all of the evidence, the person or persons used merely assist the contractor in the performance of his work or in fact perform work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others.

36. In this case the Board is satisfied that the contractor-drivers who make use of a single helper, whether occasionally or regularly, do not cease to be dependent contractors by virtue of that fact. The use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking that can be meaningfully described as deriving profit in any substantial way from the work of others. The contractor-drivers examined used helpers when they were employed as milkmen

and represented for collective bargaining purposes by the applicant prior to 1970. At that time the Board had recognized that the use of a helper did not of itself deprive an individual of his status as an employee under the Act. (*Automatic Fuels Limited* [1966] OLRB Rep. Apr. 22).

37. The circumstances of Mr. Lanoue, however, take him outside the principles which apply to a contractor who uses a helper to lighten his load. At the time of the examinations he performed no work and apparently derived all of his income as a profit from the labour of two employees who drove his two trucks. And while he normally drives one of his trucks, he employs his son on a permanent basis to drive the other, thereby substantially increasing the volume of his sales and the resulting profit to himself. Those facts cause the Board to view Mr. Lanoue as more closely resembling an independent contractor or distributor than an employee in his relationship with the respondent. The Board therefore finds that he is not a dependent contractor within the meaning of The Labour Relations Act.

38. For the reasons given above the Board finds that the eleven other contractor-drivers examined are dependent contractors and are therefore employees within the meaning of the Act. This matter is remitted to the Labour Relations Officer for further examinations in the event that the parties are unable to agree on the status of the remaining contractor-drivers in the light of the principles canvassed in this decision.

39. The Board finds that all employees of the respondent working at and out of the City of Ottawa as franchised dealers, excluding supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

40. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 23, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

41. Since the status of the seven drivers remaining to be examined cannot affect the right of the applicant to certification, the Board hereby grants interim certification to the applicant in respect of the bargaining unit.

1359-78-R United Electrical, Radio and Machine Workers of America (UE), (Applicant), v. **Durham Metal Stamping & Assemblies Ltd.**, (Respondent), v. Employee's Committee, (Intervener), v. Group of Employees, (Objectors).

Certification – Collective Agreement – Trade Union Status – Agreement between employee

group and employer raised as bar to certification – Group not a trade union – Agreement not a collective agreement

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Arthur Jenkyn and George Stevens for the applicant; R. McComb, G. V. Hawker and K. R. Coulter for the respondent; F. J. Matthews, V. Marjoram and J. Passmore for the intervener/objectors.*

DECISION OF THE BOARD: December 13, 1978

1. This is an application for certification in which there was filed a statement of objection or petition in opposition to the application.

2. An intervention was filed, signed by Dianne McInnis, on behalf of Employee's Committee, in which it is claimed that the intervener is a trade union that represents employees or is the bargaining agent for employees who may be affected by the application.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The statement of objection or petition is not relevant. The applicant has filed sufficient membership cards which are unaffected by the petition to entitle it to certification, even if full effect were to be given to the signatures of those employees who had signed the petition and also membership cards.

5. Jane Passmore, who has been an employee of the respondent for four years, testified that the Employee's Committee referred to in the intervention comprised three employees elected by their fellow employees. She said that the idea of having a committee arose out of a suggestion made by the company that the employees elect three people to make an agreement with the company. In or about September of 1976, three people were elected to the first committee. Subsequently, the employees elected replacements for persons who left the committee.

6. The committee met with the management of the respondent company and reached agreement concerning working conditions and rates of pay. The second of these agreements, effective July 1, 1977 to June 30, 1979, was filed with the Board, together with a document outlining the changes made to the 1976/1977 agreement.

7. The agreement was ratified by the vote of employees who had completed the probationary period. The agreement is entitled, "Agreement between Durham Metal Stampings & Assemblies Ltd., Pickering, Ontario and Their Employees". It is signed by officers of the company and by the three committee members. The intervener submitted that the agreement was a current collective agreement and thus rendered the present application untimely.

8. A collective agreement is defined in section 1(1)(e) of The Labour Relations Act as follows:

1.-(1) In this Act,

- (e) "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

9. It is obvious that if the document raised by the intervener is to be found to be a bar to the application, then it must conform to the above definition. This, in turn, raises the question as to whether the Committee is a trade union within the meaning of the Act.

10. Section 1(1)(n) of the Act says:

1.-(1) In this Act,

- (n) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

11. Clearly, a trade union is an "organization" under the above definition so that the intervener must establish its qualification under that factor of the definition if it is to succeed. In dealing with a similar problem, the Board, in the *Tridon Limited* case, [1974] OLRB Rep. Jan. 16, was guided by two decisions of the courts to which reference is made in paragraphs 13 and 14 of the *Tridon* decision as follows:

13. In the case of *Orchard et al. v. Tunney*, 8 D.L.R. (2d) (1957) 273 at pp. 281 and 282 the Court, in dealing with the nature of a union, stated: "... Apart, then, from statute that a Union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment to-day almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations; that the body as such is that to which the responsibilities for action taken as of the group are to be related."

14. Evans, J.A., in the course of his majority judgment in the Ontario Court of Appeal in *Astgen et al. v. Smith et al.*, 7 D.L.R. (3d) 1970, 657 at p.661, in dealing with the question of the legal status of a trade union stated: "... I concede at the outset that a labour union under the Labour Relations Act, R.S.O. 1960, c.202, and allied legislation has a 'status' conferred by such

legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relation to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed."

12. In the case before us there is evidence that the three elected employees reached and signed a written agreement with the company concerning a number of matters normally found in a collective agreement and that they carried complaints to management on behalf of employees, although this latter practice is not a function recognized by the agreement. The agreement, in fact, seems to limit the processing of complaints to the individual concerned under the heading "Employee Complaints":

In the best of "teams" some complaints are bound to arise from time to time. If any employee has a complaint, he/she is strongly urged to discuss it with the foreman and, if necessary, the Plant Manager. If the complaint is valid, immediate steps will be taken to correct the situation.

13. In any event, it is abundantly clear that in the present instance there are no contractual bonds or commitments made by the employees to each other and the group. There are no officers. There are no obligations imposed or accepted, indicative of membership in a group. The employees pay no fees or dues to any group or association. There is no constitution nor bylaws or any rules or regulations other than one unwritten understanding that probationary employees are not allowed to vote on the agreement.

14. In the result, the Board finds that there exists no organization of the employees of the respondent within the meaning of section 1(1)(n) of The Act and that the intervener, a misnomer, in effect, is not a trade union and that the agreement filed is not a collective agreement. The application is, accordingly, timely.

15. The Board further finds that all employees of the respondent at Pickering, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 22, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

0670-78-U George Wimpey (Canada) Limited, (Applicant), v. United Brotherhood of Carpenters and Joiners of America, Local Union 1946, F. Collver, M. Biro and P. Fedoruk, M. Grout and J. Kellett, (Respondents).

Construction Industry – Strike – S.123 – Union with bargaining rights in some Board areas picketing in support of province wide strike – Site picketed in area where no bargaining rights – No power in Board to restrain picketing – Board limited to restraining resulting strike if any

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *R. A. Werry, W. Lippett and K. O'Malley for the applicant; T. G. Harkness for the respondents.*

DECISION OF THE BOARD; December 21, 1978

1. This is an application for a direction under section 123 of The Labour Relations Act wherein the applicant requested that the Board direct the individual respondents to cease and desist from picketing at a job site in Woodstock. These individuals are all members of Local 1946 of the United Brotherhood of Carpenters and Joiners of America ("Local 1946").

2. Central to the applicant's case was a contention that the carpenters in its employ at the relevant job site were not in a legal position to strike. Shortly after the hearing, however, the Board certified the United Brotherhood of Carpenters & Joiners of America ("the International Union") as bargaining agent for carpenters and carpenters' apprentices in the employ of the applicant in Board Area #3, which includes the Town of Woodstock. Because of the effect of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry, and the status of negotiations involving carpenters and their apprentices, once the Board issued the certificate to the International Union the carpenters employed by the applicant in Woodstock were in a legal position to strike. The effect of the Board's certificate was thus to remove the basis for the applicant's contention that it was entitled to a Board order restraining the picketing and consequently to remove the pressing nature of the application. However, for the assistance of the parties we now propose to set forth our views with respect to the merits of the application.

3. It is a matter of public record that on March 3, 1978 the Minister of Labour designated the International Union and its Ontario Provincial Council as the employee bargaining agency to represent in bargaining all journeymen and apprentice carpenters (other than millwrights) represented by a number of affiliated bargaining agents. Among these affiliated bargaining agents were the International Union, some thirty-five locals of the International Union, including Local 1946, as well as the Carpenters District Council of Toronto and Vicinity. Also on March 3, 1978 the Minister designated the United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency to represent in bargaining all employers whose employees were represented by these affiliated bargaining agents.

4. Subsequent to these designations, the employer and employee bargaining agencies began negotiations for a first province-wide collective agreement covering carpenters

and carpenters' apprentices in the industrial, commercial and institutional sector of the construction industry. On or about July 4, 1978, the employee bargaining agency called a strike which was lawful under the Act. Picketing activity then commenced at a number of job sites where carpenters were employed.

5. It is undisputed that at the relevant time neither Local 1946 nor any other union had representation rights for carpenters in the employ of the applicant in Board Area #3. Initially it appeared that both parties were of the view that no union held representation rights for carpenters employed by the applicant anywhere in Ontario. The representative of the respondents, however, did file what he referred to as "a designation order" but what was in fact an accreditation certificate issued by the Board on April 18, 1973 (see File No. 1322-71-R). By the terms of this certificate the General Contractors Section of the Toronto Construction Association was accredited as the bargaining agent for employers of carpenters and carpenters' apprentices for whom the Carpenters District Council of Toronto and Vicinity held bargaining rights in the industrial, commercial and institutional sector of the construction industry in Board Area #8. The applicant is specified on the face of the accreditation certificate as being one of the employers affected by the accreditation. On the basis of this filing we can only conclude that at the relevant time the Carpenters District Council of Toronto and Vicinity held representation rights for carpenters and carpenters' apprentices employed by the applicant in Board Area #8 in the industrial, commercial and institutional sector of the construction industry. As already noted, the District Council is one of the affiliated bargaining agents represented in bargaining by the designated employee bargaining agency, and thus at the time of the hearing the employee bargaining agency was in a legal strike position with respect to the applicant, at least insofar as Board Area #8 was concerned.

6. At the hearing the representative of the respondents took the position that because the designated employee bargaining agency was engaging in a legal province-wide strike, carpenters in the employ of the applicant in Board Area #3 were legally entitled to strike. We are unable to agree with this contention. While the 1977 amendments to the Act did establish a system of province-wide negotiations, they did so only with respect to pre-existing bargaining rights. The amendments to the Act neither created any new bargaining rights nor extended any existing bargaining rights. (See *United Brotherhood of Carpenters & Joiners of America*, File No. 0848-78-U, decision dated August 21, 1978, as yet unreported.) Since at the relevant time no affiliated bargaining agent held representation rights for carpenters employed by the applicant in Board Area #3, it follows that the designated employee bargaining agency was not negotiating for the applicant's carpenters in Board Area #3 and consequently could not have lawfully called a strike of those carpenters. Thus, any strike of carpenters employed by the applicant in Board Area #3 at the time would have been unlawful.

7. Having set forth this background, we turn to consider the facts leading up to this application.

8. The applicant was at the relevant time acting as a general contractor on a job involving the construction of a sewage treatment plant in Woodstock. Much of the work on the project was subcontracted out by the applicant, but it did employ a number of trades directly, including carpenters. Although neither Local 1946 nor the International Union held representation rights for the carpenters involved, in fact all of the carpenters employed on the project were members of Local 1946.

9. During the course of the strike called by the employee bargaining agency, a picket line appeared at the job site manned by members of Local 1946. The respondents, Biro, Fedoruk, Grout and Kellett served on the picket line while the respondent Collver is a representative of Local 1946 who was apparently instrumental in arranging for the setting up of the picket line. All of the applicant's employees on the job site refused to cross the picket line as did the employees of the subcontractors.

10. On the basis of the facts agreed to at the hearing, we can only conclude that the carpenters who refused to report for work due to the presence of the picket line, or because they themselves were on the picket line, were engaging in a strike within the meaning of The Labour Relations Act. Having regard to our reasoning in paragraph 6 above, we are satisfied that the strike was unlawful. It is important to bear in mind, however, that the applicant did not request that the Board direct its employees to cease and desist from engaging in an unlawful strike. Instead, the only remedy requested was that the Board direct an end to the picketing.

11. Nowhere does The Labour Relations Act mention the word "picketing" or purport to set forth a general set of rules governing the conduct of picketing. This can be contrasted to the situation in British Columbia where the Labour Code expressly deals with the issue of picketing and gives to the British Columbia Board extensive jurisdiction to regulate the "why", "where" and "when" of picketing. What the Ontario Act does do is deal with the matter of unlawful strikes and gives to the Board certain remedial authority with respect to such strikes.

12. The primary prohibition against untimely strike activity is contained in section 63 of the Act.

63.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

13. This primary prohibition is reinforced by the prohibitions found in sections 65 and 67 of the Act.

65. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

67.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) *Subsection 1 does not apply to any act done in connection with a lawful strike or lawful lock-out.*

(emphasis added)

14. The Board's authority to deal with contraventions of these sections in the construction industry is to be found in section 123(1) of the Act.

123.-(1) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

15. Although the above sections make no direct reference to picketing, sections 65 and 67 are certainly wide enough to cover certain incidents of picketing. Further, the reference in section 123(1) to the Board's authority to make a direction when satisfied that a trade union has counselled, procured, supported or encouraged an unlawful strike does provide the Board with some remedial authority to deal with picketing being carried on in connection with an unlawful strike. Thus in *Wheelabrator Corporation of Canada*, [1974] OLRB Rep. July 490 when an unlawful strike of employees resulted from picketing activity unconnected with any lawful strike, the Board issued a cease and desist order against the picketing itself.

16. In the instant case, the employee bargaining agency was in a legal strike position with respect to the applicant in Board Area #8. The question thus is whether the Board's jurisdiction to deal with picketing connected with unlawful strikes also extends to picketing being carried on in one Board Area when the employee bargaining agency involved is in a legal strike position with respect to another Board Area.

17. This general topic was discussed in some length in the Board's decision in the *Canteen of Canada Ltd.* case, [1978] OLRB Rep. March 207. In that case picketing being carried out in connection with a legal strike against a company's plant in Toronto also spread to its facilities in Cambridge and Windsor where the employees were not in a legal strike position. A number of employees at these two locations declined to pass through the picket

lines. In concluding that the Board lacked the authority to restrain the picketing at Cambridge and Windsor, the Board made the following comments:

23. ...The Board's order in *D. R. Crawford Construction Ltd.*, supra, would suggest that the picketing must be connected with something other than a lawful strike before it will be restrained. By the terms of that order, the picketing was restrained "unless and until such time as the employees may be legally entitled to strike". The legal basis for this qualified order, however, was not expressly set out in that decision. On the basis of this case, therefore, one can reach only a tentative conclusion that picketing carried out in connection with a lawful strike cannot be the subject of a restraining order under section 82 or 123 of the Act.
24. This tentative conclusion is supported by those provisions of the Act intended to confine labour disputes. Admittedly, it is possible to argue, as did counsel for the applicant, that the wording of section 65 might be broad enough to prohibit any picketing that causes others to engage in an unlawful strike, whether such picketing is in support of a lawful strike or not. This one provision, however, should not be read in isolation from the other provisions of the Act. The overall statutory scheme to confine labour disputes, in the Board's view, suggests that section 65 must be interpreted more narrowly.
25. More specifically, the prohibition in section 65 must be read together with the qualified prohibition set out in section 67. Section 67, in one respect, is the more sweeping prohibition of the two, enjoining any person from acting in such a way as would cause other persons to engage in an unlawful strike. This prohibition is not restricted to trade unions, councils of trade unions, or union officials, but applies to any person. Moreover, it refers to any act that would likely cause others to engage in an unlawful strike, and not just to conduct amounting to counselling, supporting, or encouraging of the strike. In other words, under section 67, it is not necessary to establish that the conduct was intended to bring about an unlawful strike but only that an unlawful strike is a reasonable and probable consequence of the act. This sweeping prohibition, however, is expressly qualified by subsection (2), making it inapplicable where the act in question is done in connection with a lawful strike or lock-out.
26. The prohibition in section 67 is broad enough to enjoin any form of picketing not done in connection with a lawful strike and causing other employees to engage in an unlawful strike. Section 65, on the other hand, is only wide enough to catch such picketing where it can be characterized as counselling, procuring, supporting or encouraging of that strike by a union, council of unions, or trade union officials. It would be somewhat incongruous if, when the more comprehensive prohibition against picketing is rendered inapplicable, the less comprehensive prohibition remains operative. The result would be a situation where the Board could restrain picketing in connection with a lawful strike where

official union support for that picketing is present, but not in those cases where this element has not been established.

27. In the Board's view, the Legislature intended section 67 to regulate primarily the conduct of picketing activity. To the extent that section 65 also touches upon picketing, it must be read subject to section 67. Picketing in connection with a lawful strike, therefore, even though it may cause other employees to engage in a strike, does not fall within the conduct proscribed by section 65.
...
30. In view of this Board's wide authority to restrain untimely work stoppages, the need for a wide power to restrain picketing is less apparent. Where the harmful consequences flowing from such picketing can be themselves restrained, it would appear less necessary to restrain the picketing as well. This point assumes even greater significance given the difficulties associated with determining the legitimate scope of picketing in support of a lawful strike.
31. The difficulties can be seen when one examines the common law relating to picketing. Although the Board does not intend to deal in any detail with the common law relating to picketing in support of a legal strike, a quick glance at this body of law reveals the problems that arise when attempting to regulate picketing in support of a lawful strike where that picketing has some secondary impact. For a perceptive analysis of this problem, see Beatty, "Secondary Boycotts: A Functional Analysis" (1974), 52 C.B.R. 388. It is sufficient to say that at common law not all picketing that causes other employees to strike would be regarded as illegal. The Courts have realized that a selective approach to picketing must be taken. Yet, if we were to accept the interpretation of section 65 argued by the applicant, the Board would have to adopt an approach to picketing that would be far too broad in its scope and one which would not be responsive to labour relations realities in this Province.
34. In Ontario the legislative emphasis has been in a different direction, focusing upon the lawfulness of strike activity, rather than upon picketing. A concerted refusal to work is considered to be a strike regardless of whether it is in response to the presence of a picket line. Moreover, picketing not in connection with a lawful strike that causes other employees to strike, is considered to fall within the prohibitions set out in section 65 and 67. Falling outside of these provisions, however, is picketing done in connection with a lawful strike. If such picketing causes other employees to engage in an illegal strike, then that illegal strike, but not the picketing that causes it, can be the subject of a Board direction. This conclusion does not necessarily mean that such picketing is permitted by the general civil and criminal law. Rather, it simply means that picketing done in connection with a lawful strike is not touched directly by the Board's remedial authority as set out in the *Labour Rela-*

tions Act. Accordingly, if persons wish to restrain such picketing, they must seek their remedy in the Courts.

35. The picketing that is the subject of this application, in the Board's view, has been done in connection with a lawful strike. The pickets that appeared at Windsor and Cambridge represented the Toronto employees who were engaged in a lawful strike against the applicant. The striking Toronto employees were clearly attempting to resolve that dispute by asserting greater pressure upon the applicant through picketing its other operations. In these circumstances, the Board must conclude that the picketing was done in connection with a lawful strike.

18. We would adopt the reasoning set out above and in applying it to the situation before us we are of the view that since the picketing being complained of was being carried on in connection with a lawful strike, the Board did not have the remedial authority to issue a direction restraining the picketing. In coming to this conclusion we would reiterate that although the Board has no general authority to regulate picketing, the Act does provide it with authority to deal with unlawful strikes resulting from picketing, even in those instances where the picketing itself is in support of a lawful strike. In the instant case the applicant sought no direction against employees engaging in an unlawful strike, but only a direction aimed at bringing the picketing to an end. In that the Board lacked the jurisdiction to restrain the picketing being complained of, this application is hereby dismissed.

0397-78-R Canadian Food and Allied Workers and Local Unions 175 and 633, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O.-C.L.C., (Applicant), v. Loblaw's Limited and Gordons Markets a Division of Zehrmarkt Limited, (Respondents).

Sale of a Business – Successor Status – Complicated transaction between related corporate entities in order to exploit convenience food part of total retail food market – Surrender of lease, execution of new lease, and extended shutdown – Successor status found

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

APPEARANCES: *Harold F. Caley, Dennis Sexton and W. Adam for the applicant; W. Gibson Gray, Q.C., R. W. Kitchen and Richard Goldsmith for Gordons Markets a Division of Zehrmarkt Limited; no one appearing for Loblaw's Limited.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER D. B. ARCHER: December 29, 1978

1. The name of one of the respondents appearing in the style of cause of this application as "Gordons Super Markets Limited" is amended to read: "Gordons Markets a Division of Zehrmarkt Limited".

2. The applicant has applied to the Board under section 55 of The Labour Relations Act and has alleged the sale of a business by Loblaws Limited ("Loblaws") to Gordons Markets a Division of Zehrmart Limited ("Gordons"). The applicant alleges that as a result of this sale Gordons is bound by a collective agreement entered into by the applicant and Loblaws. The applicant requests that the Board make a declaration that a sale of a business has taken place within the meaning of section 55 and an order that as a result the successor employer, Gordons, is bound by the collective agreement between the applicant and Loblaws in effect at the time of the sale.

3. Loblaws and Gordons, in their replies, have taken the position that there was no sale of a business under section 55 of the Act.

4. The facts which surround this case are not in dispute. On April 22, 1970, the Amalgamated Meat Cutters and Butcher Workmen of North America, Local 633, was certified as the bargaining agent of all meat department employees of M. Loeb (London) Limited, trading as Shoppers City, at its retail stores in Chatham. On June 3, 1970, the Amalgamated Meat Cutters and Butcher Workmen of North America, Local 175, was certified as the bargaining agent of all employees of M. Loeb (London) Limited, trading as Shoppers City, except meat department employees, at its retail stores in Chatham. In 1973, Loblaws Groceterias Co. Limited (now Loblaws) purchased certain stores of M. Loeb (London) Limited, including the stores in Chatham. At that time Loblaws Groceterias Co. Limited agreed that the purchase from Loeb fell within the terms of section 55(2) of The Labour Relations Act and that they would be bound by the existing collective agreement as if they had been a party thereto. In December 1974, a new collective agreement was entered into between the applicant and Loblaws in 1976, effective from December 6, 1976 to July 1, 1978.

5. On October 17, 1977, Loblaws conducted a fifteen per cent off sale at the store at 595 Grand Avenue West in Chatham (the "store"). The staff at this store consisted of five full-time and nine part-time employees. They were laid off on Saturday, October 22nd, 1977, because the store was an individual unit in Chatham and there was no other store in Chatham into which they could exercise any "bumping" rights. The manager of the store had left the employ of Loblaws sometime earlier. The assistant manager managed the store up to the last week it was open. The meat manager went to work for Loblaws in Kingston. The head of the produce department was laid off because he was not required. The merchandise which remained in the store was loaded on to a truck on October 24, 1978, and was taken to a Loblaws' store in London. On October 24, 1978, after the merchandise had been removed from the premises, Mr. Kranz, the superintendent, locked the store and gave the keys to a firm selected by Loblaws to act as security guards.

6. Various steps were then taken including the removal of the head sign and the removal of the equipment. This was achieved no later than February 17, 1978. On March 1, 1978, Zehrmart Limited ("Zehrmart") began renovations on the store and added 840 square feet to the store. A new lease was being negotiated in March of 1978 with the head tenant K mart Canada Limited ("K mart"). That lease, which had not been fully executed as of the time of the final hearing in this application, was entered into as of May 9, 1978. On May 9, 1978, the store opened for business. Under this lease Zehrmart is required to pay rent from January 1, 1978.

7. Zehrmart is a corporation which was formed about two years ago. Zehrmart had

its name changed from Savette Limited on December 1975, and purchased the assets of Zehr's Markets Limited in January of 1976. Zehrmart has also taken over the stores of Gordons Super Markets Limited. The latter is an existing corporate entity. The main shareholder of Zehrmart is Loblaws.

8. After the store re-opened it has been staffed for the most part by full-time employees who were transferred from existing stores of Gordons or hired from Gordons existing part-time employees. Three of Loblaws' employees applied for employment at the store. Two were part-time cashiers and they were hired by Gordons and given employment in two of Gordons' other stores in Chatham, on St. Clair Street and on Richmond Street. The person who applied for employment in the produce department was not interviewed because Gordons did not require a person for its produce department. There are no longer any Loblaws stores in Chatham at this time. On the other hand, Gordons is an expanding operation and over the years it has acquired stores from individuals, Red and White, I.G.A., Dominion, A & P and Oshawa Wholesale.

9. The Board heard evidence from William Herzog, the vice-president of finance at Zehrmart; Elroy Kranz, Loblaws' distribution manager for western Ontario; Richard Goldsmith, an employee of Gordons' and George Trow, the corporate solicitor for K mart.

10. Mr. Herzog testified that in March of 1977 the net assets of Gordons Super Markets Limited were transferred to Zehrmart. A total of fifty stores are operated by Zehrmart. Thirty-seven of these stores are operated as Zehr's stores and thirteen are operated as Gordons stores. The Zehr's stores have spread out from Kitchener - Waterloo and the Gordons stores have spread out from locations in the Counties of Essex and Kent. The witness gave evidence that after negotiations with K mart the previous lease would be cancelled upon the execution of a new lease. Zehrmart would be required to make payments under the new lease which covered the period from January 1, 1978, until November 29, 1991. The store now comprises some 23,600 square feet. The proposed new lease requires payment of a minimum annual rent and a percentage of the gross receipts. The renovations to the store and equipment cost almost six hundred thousand dollars. This amount is to be paid by Zehrmart.

11. Mr. Herzog informed the Board that Zehrmart operated its own warehouses and that the management of Zehrmart is in Cambridge. The management of Zehrmart makes decisions at the local level and operates in an autonomous manner. In the past Zehrmart has competed with Loblaws stores. Zehrmart operates its own trucks, does its own buying and marketing, uses its own real estate department, has its own industrial relations department and conducts its own collective bargaining.

12. In cross-examination Mr. Herzog agreed that Zehrmart is a wholly owned subsidiary of Loblaws and confirmed that the directors of Loblaws and Zehrmart are not similar. At this point counsel for Gordons conceded that there is a corporate relationship between Loblaws and Zehrmart in that both corporations are part of the Weston organization. He also conceded that Mr. W. Galen Weston is not an officer of Loblaws. The witness informed the Board that Mr. Weston is a director of Zehrmart and agreed that prior to January of 1976 Zehr's Market Limited operated a number of outlets. Prior to the transfer of assets, Zehr's Markets Limited was a subsidiary of Loblaws. The witness explained that prior to March of 1977 Gordons Super Markets Limited was a subsidiary of National Grocers Lim-

ited which was in turn a subsidiary of Loblaws. Mr. Herzog agreed that prior to March of 1977 Gordons Super Markets Limited was operating retail stores in the Counties of Essex and Kent. At this point counsel for Gordons volunteered that in 1963 Gordons Super Markets Limited first became connected to National Grocers Limited.

13. Mr. Herzog agreed, in cross-examination, that the net assets of Gordons Super Markets Limited were transferred to Zehrmart Limited in March of 1977 and that at that time the entity of Gordons Markets was in existence. He informed the Board that the trade name Gordons Markets was used the day after the transfer was made in March of 1977 and that Gordons Super Markets Limited is merely a shell and will be wound up. In January of 1978 there were three Gordons Markets operating in Chatham. On November 22, 1977, negotiations were entered into between Zehrmart and K mart with respect to a lease of the store. There was no written offer to lease. The prior lease was between K mart and Loblaws. The witness agreed that upon the execution of the proposed lease between Zehrmart and K mart, the lease between Loblaws and K mart would have to be cancelled. He confirmed that Zehrmart has paid the rent effective January 1, 1978, that on March 1, 1978, Zehrmart physically took possession of the premises and that between March 1, 1978 and May 9, 1978 renovations were being made to get the store ready for opening. The witness explained that the decision to commence paying the rent from January was made because discussions were proceeding between Zehrmart and K mart at that time with regard to the decorating which was to be done. The witness described the design of the logo for Gordons Markets and for Loblaws and stated that the colours are the same and the letters are different. He informed the Board that the rent was the same under the proposed new lease as under the lease between K mart and Loblaws.

14. Counsel for Gordons filed the logo for Loblaws and for Gordons. The two colours used in each logo are similar. The logo for Loblaws is in the form of a series of L's while the logo for Gordons is in the form of the letter G. Counsel also filed a list of the directors and officers of Zehrmart and Loblaws. Richard J. Currie is an officer and director of these two corporations. Roger A. Lindsay is an officer and director of Zehrmart and a director of Loblaws. George C. Metcalfe is an officer and director of Loblaws and a director of Zehrmart. W. Struan Robertson is a director of these two corporations. Charles M. Humphrys is a director of Zehrmart and an officer of Loblaws.

15. Elroy Kranz testified that when this store was closed it was the last store which Loblaws had in Chatham. He informed the Board that Loblaws had taken the decision to terminate the retail business at the store at 6:00 p.m. on October 22, 1977. At this time the staff was laid off. In cross-examination the witness guessed that Loblaws previously had three retail stores in Chatham.

16. Richard Goldsmith confirmed that Gordons operated thirteen retail food stores in the Counties of Essex and Kent and that Loblaws previously operated three such retail stores in Chatham. He referred to the location of the former stores and to the competition which formally existed between Loblaws and Gordons in Chatham. The witness traced the history of the acquisition of stores in Chatham by Gordons. Mr. Goldsmith informed the Board that Gordons had taken advantage of some of Zehrmart's expertise in the operation of its stores. The witness gave evidence that Gordons uses National Grocers' warehouse in Chatham and does not use either Zehrmart's three warehouses in Kitchener or Loblaws' warehouse in Erin Mills. He stated that the renovations to the store were made by Zehrmart and began on or about March 1, 1978, and that 840 square feet were added to the store.

17. In cross-examination the witness agreed that National Grocers is part of the Weston-Loblaws chain corporations. He guessed that the former store operated by Loblaws on Queen Street in Chatham was closed during the 1970-1971 period. Mr. Goldsmith confirmed that all of the Gordons stores were supplied from the same source. He stated that while Zehrmart participated in selecting the sites for Gordons stores there was some participation in such decisions by Gordons. The witness expressed the view that Zehrmart would become aware of the availability of the store in question and would have started negotiations to obtain a lease for the store.

18. Mr. Trow gave evidence that he has been a corporate solicitor for K mart since March of 1977 and has been generally responsible for matters regarding leasing and real estate transactions for K mart. He testified that he first became involved in transactions with respect to the store on August 5, 1977. On that date he attended the offices of Loblaws together with his supervisor, Geoffrey Sommerville. On that occasion they met Richard Dube who is the director of real estate for Loblaws. Mr. Sommerville was asked by Mr. Dube whether Loblaws could terminate its lease of the store and in their stead Zehrmart could step in. Mr. Sommerville's response was positive but tentative because such a decision could not be made by him but rather had to be referred to K mart's executives. It was agreed and understood at the meeting that the store would remain as a retail food store.

19. The witness was present at the next stage of the developments when Mr. Dube attended Mr. Sommerville's office. The same matters were again discussed and the possibility of Zehrmart signing a sublease was discussed. At this point Mr. Dube requested that there be a lapse of a day between the surrender of the Loblaws lease and the commencement of a new sublease with Zehrmart. This was mentioned by Mr. Dube in connection with labour problems but was not discussed in detail. Mr. Sommerville saw no problems with the leasing arrangements and Mr. Trow was instructed to draft the documents in accordance with Mr. Dube's request.

20. On September 2, 1977, Mr. Trow sent a letter to Loblaws' legal department. The letter referred to the surrender of lease between Loblaws and K mart and the new lease between K mart and Zehrmart. From the point of this proceeding Mr. Trow raised a problem regarding the surrender of lease and stated:

2. In the surrender of Lease, Item #3 on Page 2 should read as follows:

"K mart hereby accepts the assignment and surrender of the demised premises in the manner aforesaid but notwithstanding anything hereinbefore contained, Loblaws guarantees that payment in full of all rentals set out in the Indenture of Lease dated the 31st day of December, 1973, for the remainder of the lease term stipulated therein said Indenture, shall be forthcoming, and in the event such amounts are not forthcoming for any reason whatsoever, save and except for the default of K mart, Loblaws will pay to K mart all such monies as may be necessary in order that K mart will receive the full rentals set out herein for each and every year of the remaining lease term."

This provision our Company considers to be both necessary and fair in order that our own position not be weakened as a result of this transfer.

Also, when you fill in the appropriate dates on both documents, please be advised that we have no objections if the Surrender of Lease is one day prior to the date of the new Lease.

Finally, we see no real problem in granting Zehrmart Limited three five-year options for renewal on the same terms and conditions as set out in the Indenture of Lease dated the 31st day of December, 1973, provided, of course, that K mart must first exercise one or more of its renewal options pursuant to the Head Lease. Accordingly, if you so desire such a right, the following clause may be inserted at the end of Article 2 of the K mart – Zehrmart Lease:

“Moreover, the aforesaid notwithstanding, Lessee shall have the option to extend the term of this Lease for three additional periods of five (5) years upon the same terms and conditions of this Lease provided that Lessor also exercises its option under the Head Lease to extend its term for three additional five (5) year periods. In the event that Lessor only extends its term under the Head Lease for one or two five (5) year periods, then Lessee shall have the option to extend its term under this Lease for one or two five (5) year periods respectively, upon the same terms and conditions of this Lease. No such option or options, however, may be exercised by Lessee unless written notice is given to Lessor not less than six (6) months prior to the expiration of the then existing term.”

If you do decide to include the paragraph set out above in Article 2 of the K mart – Zehrmart Lease, then we must also request that you add the following proviso at the end of Item #3 on Page 2 of the Surrender of Lease as revised by this letter:

“Further, if the lease term set out in the Indenture of Lease dated December 31st, 1973 is extended beyond the date of the expiration of said lease term, then Loblaws also guarantees payment of all rentals due pursuant to such extension of the lease term for the remainder of the new lease term or terms so created.”

I trust that the foregoing meets with your approval. Upon receipt of the revised documents, we will execute same with due dispatch and return them to your Offices.

21. On September 16, 1977, Loblaws replied in a letter to K mart that the suggestions put forward by Mr. Trow were acceptable. Copies of the proposed lease dated September 30, 1977, between K mart and Zehrmart and of the surrender of lease dated September 15, 1977 between Loblaws and K mart were enclosed. The letter concluded by stating that Loblaws anticipated being in a position to execute these documents on September 20, 1977.

22. In a letter from Mr. Trow to Mr. Dube dated November 15, 1977, K mart agreed to a request from Loblaws that there should be a hiatus period of one hundred and twenty days written into the documents and expressed concern about the delay in the progress of

the documentation. There was further correspondence during November and December of 1977 from Mr. Herzog to Mr. Trow which referred to the new lease to be executed between K mart and Zehrmart dated January 1, 1978, and a surrender of lease for Loblaws to be dated December 31, 1979. On January 12, 1978, Mr. Trow sent a letter to Mr. Herzog with respect to the new lease and the surrender of lease and there was an exchange of correspondence during February, April, May and June between Mr. Trow and Loblaws and between Mr. Trow and Zehrmart over the lease, the surrender of lease and renovations of the store.

23. While the simultaneous execution of the documents was contemplated none of these documents has ever fully been executed by all the parties. Negotiations continued and it was contemplated that in addition to the foregoing documents a separate guarantee document would be executed whereby Loblaws would guarantee the sublease between K mart and Zehrmart. By June 29, 1978, Loblaws and Zehrmart had executed the surrender of lease, the new lease and the guarantee agreement. Mr. Trow informed the Board that he had probably had conversations with Mr. Herzog prior to his letter dated November 22, 1977, and was sure that he had discussed the guarantee of lease with Mr. Herzog prior to its execution by Loblaws and Zehrmart.

24. In cross-examination the witness agreed that the lease between Loblaws and K mart contained a covenant for the continuous occupancy of the store. Mr. Trow agreed that this covenant was the main reason for the discussions between Loblaws and K mart. He agreed that it was not necessary to have a guarantee of lease and explained that this was an executive decision within K mart because there was not the same confidence in Zehrmart as there was in Loblaws. Mr. Trow agreed that changes in the new lease were necessary to clear up inconsistencies. He agreed that all discussions regarding structural changes and the installation of a system to play music in the store occurred between K mart and Zehrmart. The witness agreed that to all intents and purposes Loblaws has surrendered the lease on the store.

25. The applicant argued that the instant application was on all fours with an earlier case which involved Gordons. See the *Gordons Markets a Division of Zehrmart Limited*, case [1978] OLRB Rep. July 630. The applicant also argued that the evidence in the instant case went beyond the evidence in the earlier case in that there is a clear transfer of a lease from Loblaws to Gordons. The applicant pointed out that Loblaws is the main shareholder in Zehrmart and that two former employees of Loblaws in Chatham were hired by Gordons for employment in Chatham. The relationship between the corporations within the Weston organization was stressed. It was postulated that because Loblaws and Zehrmart wanted to retain the store and prevent it from falling into the hands of the competition Zehrmart was willing to pay rent from January 1, 1978.

26. The applicant referred to Loblaws' desire for a lapse of one day between the surrender of its lease with K mart and the commencement of the new lease between K mart and Zehrmart and the reference by Mr. Dube to this request having something to do with labour problems. The request for an hiatus period of one hundred and twenty days was characterized by the applicant as an attempt to avoid difficulties with trade unions. The applicant pointed to identical use of the premises and the great similarity between Loblaws' lease and Zehrmart's proposed new lease.

27. Gordons referred to the application for judicial review with respect to the *Gordons Markets a Division of Zehrmart Limited* case, *supra*. It was argued that the Board had previously asked itself the wrong question and had exceeded its jurisdiction. This panel of the Board does not sit in review of a decision of another panel of this Board. However, the Board has considered the arguments in so far as they relate to the facts of this application. Gordons placed great emphasis on the argument that the leasing arrangements were not part of the business of Loblaws. It was argued that the premises could not be advertized for rent because of the requirement of continuous occupancy under the lease between Loblaws and K mart.

28. Gordons pointed out that there was nothing wrong in operating its affairs so as not to attract a problem that it would not otherwise have and referred to the request for a delay of one day between the surrender of Loblaws' lease and the proposed new lease and the request for an hiatus period. Gordons referred to the relationship between Loblaws and Gordons and urged that this aspect of this application was not determinative of whether there was a sale of a business under section 55 of the Act. It was also argued that there was no good will in the circumstances of the opening of the store by Gordons and that the closing of the store for six months was some evidence that the business was not continuing. The Board was urged to find that there was not a sale of a business under section 55 because the leasing arrangement is not a sale of a business within the meaning of sections 55(1) and (2) of the Act.

29. The facts in the instant application are very similar to the facts in the *Gordons Markets a Division of Zehrmart Limited* case, *supra*. In a decision which was released on November 21, 1978, the Divisional Court denied Gordons' request for judicial review. In dismissing the application, the court held that the Board had asked itself the right question, even though the court stated that had the matter been before it for determination its determination would not have been the determination made by the Board. In the instant case, unlike the earlier *Gordons Markets a Division of Zehrmart Limited* case, *supra*, Loblaws has been required and has agreed to guarantee the proposed new lease between K mart and Zehrmart.

30. While negotiations were proceeding between Loblaws and K mart and between K mart and Zehrmart, such negotiations are properly viewed as one and not two sets of negotiations. It is significant, in our view, that Loblaws and not Zehrmart initiated the genesis of the idea for the surrender of Loblaws' lease and the execution of a new lease between Zehrmart and K mart. The evidence clearly indicates that K mart's acceptance of Loblaws' surrender of lease was dependant upon a new lease being executed by Loblaws. It was Mr. Dube of Loblaws and not Zehrmart who sought the delay of one day between the surrender of Loblaws' lease and the new lease between K mart and Zehrmart. Again, it was Mr. Dube of Loblaws and not Zehrmart who requested the hiatus period. The negotiations with respect to the lease were carried on between K mart and corporations within the Weston organization. There is no evidence before the Board that Loblaws contemplated a simple surrender of lease without the involvement of Zehrmart. The business of the store was, in our view, merely transferred from one part of the Weston organization to another part of the Weston organization. It was a transfer of the same business from Loblaws to Zehrmart.

31. As the Board stated in the *Thorco Manufacturing Limited* case, 65 CLLC ¶16,052, the two-fold purpose of section 55 is to prevent the undermining of bargaining rights and to

provide for the continuance of established bargaining rights. The lack of direct contact or transfer between predecessor and successor employers will not in itself defeat an application under section 55. This is particularly true where two corporations within a common corporate organization are involved.

32. As the Board stated in the *Zehr's Markets Limited* case, [1974] OLRB Rep. May, 331, in the retail food market business the location of the premises *per se* is a significant factor in considering the sale of a business. This factor is even more significant when the premises change hands between two corporations within a common corporate organization rather than in an arm's length transaction. See the *Sunnybrook Food Market (Keele) Limited* case, [1974] OLRB Rep. January 47.

33. Even though there is a requirement of continuous occupancy under the lease, the effective transfer of lease did occur and it occurred under circumstances where Loblaws did its best to have a new lease of the store in favour of Zehrmart. In fact, from a legal point of view Zehrmart is carrying on business in a store where Loblaws and not Zehrmart remains the lessee. There is no dispute, however, that to all intents and purposes Loblaws has surrendered the lease on the store and that K mart is prepared to accept the surrender of lease, the proposed new lease and the guarantee of lease.

34. In our view there was an element of goodwill which attached to the store notwithstanding the delay in Gordons commencing to operate its business. The failure of Gordons to hire former employees of Loblaws at the store in no way affects the claim by the applicant that a sale of a business has occurred.

35. Although the Divisional Court has expressed its views on the correctness of the Board's decision in the earlier *Gordons* case, that decision is consistent with the Board's jurisprudence. For the reasons set forth herein and for the reasons set forth in the *Gordons Markets a Division of Zehrmart Limited* case, [1978] OLRB Rep. July 630, the Board finds that a sale of a business within the meaning of section 55 of the Act has occurred between Loblaws and Gordons Markets a Division of Zehrmart Limited.

36. The Board declares that Gordons Markets a Division of Zehrmart Limited is bound by the collective agreement which was in effect between Loblaws Limited and the applicant from December 6, 1976, until July 1, 1978, and subject to the rights and duties which flow therefrom.

DECISION OF BOARD MEMBER J. D. BELL:

1. I have had the opportunity of reading the decision of the majority and I regret that I cannot agree with it. In my view, this transaction does not constitute a "sale of a business" within the meaning of section 55 of the Act.

2. The facts are relatively straightforward and not seriously in dispute. On or about October 22nd, 1977, the Loblaws store on Grand Avenue in Chatham "went out of business". The merchandise was removed from the store and taken to London. The managerial employees were either laid off or took up positions at other Loblaws locations. The trade fixtures, signs, and advertising material were also removed and the building remained locked and vacant until March of 1978. No retail business was conducted at this location

until May of 1978 – that is more than six months after Loblaws had vacated the premises. No Loblaws employees were retained to work at this location; indeed the managerial organization and most of the full-time employees were transferred from pre-existing stores operated by Gordons. It seems clear to me that Gordons was extending *its business*, it was not acquiring Loblaws' business.

3. Before the Board, much was made of the fact that Loblaws, Zehrmart and Gordons were all related to the "Weston Group" of businesses. It is clear, however, that although related to a common corporate parent and engaged in *similar* businesses, Loblaws and Zehrmart do not operate the *same business*. Zehrmart has an independent management and has in fact competed with Loblaws. Zehrmart operates its own trucks, does its own buying, develops its own marketing strategy, uses its own real estate department and, significantly, has an independently directed labour relations policy. The relationship between Loblaws and Zehrmart is remote and is not, in my view, significant for the purposes of our section 55 determination. Nor do I think it relevant that in discussing the surrender of Loblaws' lease some consideration was given to the labour relations consequences. In view of the uncertainty arising from recent Board decisions in this area, the matter is one which any prudent solicitor would consider. There is, in my view, no scheme to undermine or defeat the union's bargaining rights. Neither Zehrmart nor Loblaws are seeking to avoid their contractual or legal obligations. Loblaws is withdrawing from the Chatham market because it believes its capital can be more profitably employed elsewhere. Zehrmart is expanding its operation in the Chatham area because it believes it can be more successful than was Loblaws.

4. The transaction took the form of a surrender of Loblaws' existing lease with K mart and the execution of a new lease in similar terms between K mart and Zehrmart. I do not attach much significance to the fact that the new lease was in similar terms or to the fact that, as a condition of the surrender of the old lease, Loblaws was required to secure K mart against the possibility of a default by the new lessee. Loblaws was seeking to "buy itself out" of a long-term obligation with K mart. It is not surprising that K mart would seek to protect itself against the possibility of loss by extracting from Loblaws a guarantee of the revenue flow which it would have received had Loblaws not surrendered the lease. This security device is designed to protect K mart. I do not regard it as any indication that the businesses of Loblaws and Zehrmart are the same.

5. In a number of cases, the Board has recognized the distinction between the transfer of the predecessor's business to a new owner and the creation of a similar or parallel business by a competitor. In *Thunder Bay Ambulance Services Inc.* [1978] OLRB Rep. May 467 at page 471, the Board noted:

...The Board, however, must be careful to distinguish between the predecessor's "business" and a similar or parallel business which performs work of a similar nature. In the former the transfer is a sale of a business within the meaning of Section 55 whereas in the latter situation it is not. The *Sunnybrook Food Market* case (*supra*) cited by counsel for the respondent company, involved the sale of certain assets and the start up of a similar business at the same location as the predecessor. Notwithstanding the sale of certain assets and the similarity of work, the Board found that the predecessor's "business" had not been transferred. (See also *Zehrs Market Ltd* [1974])

OLRB Rep. June 331, *Ralph Ford Electrical Contractors Ltd.*, [1974] OLRB Rep. June 388 and *C.C.C. & Point Anne Quarry Co.* [1975] OLRB Rep. Dec. 905.) The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a continuation of that "business".

6. In *Zehrs Markets Limited* case [1974] OLRB Rep. May 331, the Board declined to find that a section 55 sale had taken place on facts which are very similar to those with which we are faced in this case. In *Zehrs*, supra, there was an assignment of a lease and the transfer of some forty thousand dollars worth of assets from "Busy B" to "Zehrs". Zehrs made certain renovations and subsequently began to operate a retail food store. As in the present case, there was a relationship between Zehrs and Busy B: Busy B was a wholly owned subsidiary of Loblaw's and all three companies were a part of the "Weston Group" of businesses. As in the present case, there was a hiatus of several months between the closing of Busy B and the opening of Zehrs.

7. Because of the striking resemblance to the facts before us, it is worth considering the decision of the Board in the *Zehrs* case at some length. At pages 335 to 337 the Board reasoned:

15. Counsel for the applicants submits that in the retail food industry where there has been a transfer of premises between the vendor and purchaser that this Board has found that the transfer of location *per se* constitutes is no transfer of goodwill or that there is not a restrictive covenant.

16. We are in agreement with that submission to the extent that we agree that it is not necessary that there be a transfer of goodwill or that there be a restrictive covenant in order to find that there has been a sale of the business. We do agree location is a significant factor in the retail food industry, where the location *per se* may be a most important asset to be transferred. However, the total transaction and the total circumstances of each case must also be considered. Generally, some consideration must be given as to whether there has been a transfer of assets or whether there is a transfer of sufficient of the enterprise to constitute a sale of business. Another factor in determining that a sale has taken place is whether personnel have been transferred, either managerial personnel or employees. It is obvious that in those cases where employees have been transferred that there is some form of business continuation between the predecessor and successor business. A recognition of that factor carries with it the peril that a predecessor seeking to rid himself of a union may not hire the employees of the vendor in order to rid himself of the suggestion that there is a sale. But, while the continuation of employees is one factor indicating a sale of a business, we do not accept the converse of that proposition, that is, that the refusal to continue employment in the predecessor negates the fact of a sale. Thus, the absence of continued employment in a predecessor company will not negate a sale and in those cases all of the evidence and the circumstances will be considered.

17. In summary the Act contemplates some type of continuum of the business or enterprise either in whole or in part which requires the complete transaction and circumstances to be considered, and where there is some

continuum of the business the Board will usually find that a sale has taken place. That proposition is based on a *bona fide* transaction; however, cases where there is an attempt to get rid of the union will be considered on a different basis; see *Aircraft Metal Specialties Ltd.*, *supra*.

18. Considering the transaction in this case in the light of the decided cases, it is apparent that there is no continuum of the enterprise as is suggested in the cases referred to by the union in argument. While there is a corporate relationship between the vendor and the purchaser, we are satisfied that there is sufficient independence in the purchaser to constitute it a separate entity for the purpose of this transaction.

22. However, in this case the premises had been closed for a lengthy period of time and signs had been placed on the premises advertising that it was for rent. This would indicate to habitual and prospective consumers not only that Busy B had gone out of business, but also that any other interested third party willing to take possession of the premises would be free to operate a business other than a retail food business at that location. Thus, the signs on the premises together with the lapse of time between the closing of Busy B and the opening of Zehrs indicate a sufficient termination of operations, that little, if any, goodwill arising from the location would accrue. While location *per se* is a significant factor in the retail food industry, because of the consumer habit of attending at a particular locale, the facts in this case are such that any benefit derived from local *per se* had been dissipated.

23. Accordingly, we determine that the assignment of lease and the transfer of the assets in this case does not constitute a sale of business in the sense that there has not been a continuum of the business or the enterprise within the meaning of the Act. The application is dismissed.

8. The essence of the reasoning in *Zehrs* and other cases (see, for example, *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732) is that there must be the transfer of a business *AS A GOING CONCERN*. In *Brantford Concrete Pipe Company Limited*, [1966] OLRB Rep. Dec. 731 at page 733, the Board declined to make a section 55 declaration because:

...the employer did not take over the business of (the predecessor) as a going concern, the plant having been shut down and under receivership for a period of six months. Rather, the employer only acquired, by purchase, the physical plant of (the predecessor), that is the land, buildings, equipment and installations.

A section 55 declaration cannot be made simply because there has been a transfer of property or equipment which has earning potential when incorporated in a new business; nor is it appropriate to attach bargaining rights to any business which may be carried out at the location of the former business or which may use some of its assets. As I have already suggested, the question is: has the business been transferred *as a going concern*?

9. In *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 at page 698, the Board listed a number of factors which had to be considered:

...among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it is [sic] was before, i.e. whether there has been a continuation of the business.

It will be observed that almost none of the above noted factors are present in the instant case. There has been no transfer of employees, managerial expertise, trademarks, customer lists, accounts receivable, existing contracts, inventory, etc. The store was closed down for several months through the fall and winter. This would effectively dissipate any goodwill associated with the habits of customers who formerly patronized the Loblaws store, located on the same premises; and, in my view, it cannot be said that *the business* adheres in the premises. (See *Sunnybrook Food Market*, [1974] OLRB Rep. Jan. 47, where this general proposition was rejected.

10. I do not agree that the decision in *Gordons Markets a Division of Zehrmart Limited* case, [1978] OLRB Rep. July 630 is consistent with the Board's jurisprudence. However, I am in agreement with the Divisional Court's view as to the correctness of that decision as stated in its review released November 21, 1978.

11. Having regard to the facts of this case and the analysis of the Board in the previous *Zehrs* case, I would not have found that there was a transfer of Loblaws' business to Gordons. In my view, these are successive similar businesses, not the transfer of a going concern. Accordingly, I would not have made any declaration under section 55.

1573-77-M Canadian Union of Public Employees and its Local 1797,
(Applicant), – v – **The Catholic Children's Aid Society of
Hamilton-Wentworth**, (Respondent)

Reference – Employee – Whether subject employees exercise managerial functions.

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members O. Hodges and F. W. Murray.

DECISION OF THE BOARD: December 20, 1978.

1. This is an application under section 95(2) of The Labour Relations Act to determine whether

Mrs. M. Moran – Cleaner, receiving home
Mrs. M. Schell – Receiving Home mother
Mrs. L. Morris – Group Home mother
Mrs. Westbury – Group Home mother
Mrs. Trafford – Group Home mother and
Mrs. O'Rourke – Group Home mother

are employees of the respondent for purposes of The Labour Relations Act. The Board authorized an Examiner to meet with the parties and enquire into the duties and responsibilities of the above named persons. His report was released on March 6, 1978 and the parties were invited to make further submissions to the Board. The respondent submitted a copy of its contract with Mrs. Norris. Neither party requested a hearing.

2. Mrs. M. Moran, Cleaner at the receiving home, was hired by the respondent and is assigned to work in Mrs. Schell's receiving home. She is paid by the respondent and her time off is arranged through the respondent. The Board finds that Mrs. M. Moran is an employee for purposes of the Act.

3. The Examiner also heard evidence from Mrs. L. Norris and Mrs. Westbury, Group home mothers and Mrs. M. Schell, Receiving home mother. The Board has assumed that the situations of Mrs. Trafford and Mrs. O'Rourke are identical in all material respects to those of the group home mothers who were examined.

4. The women in question (and their husbands) have signed contracts jointly with the respondent by which they have agreed that their homes will be used as group or receiving homes for a specified number of children in the care of the respondent. The contract assigns certain responsibilities and duties in relation to the children, which are basically to care for the children as a normal parent would. The legal responsibility for the child and the rights normally held by parents remain with the respondent. The couple and their home are required to meet the standards set by the respondent. The respondent retains the ultimate authority over which children will be placed in a home and over the type of treatment and needs of each child, although the parents have input into that process.

5. Under the contract, house parents are responsible for all of the operating expenses of the premises, the provision of food, shelter, clothing, spending and personal grooming allowances and all other needs of the children. They have a duty to "maintain adequate

standards of care" for the children. In fact, the women in question perform most of the labour required to fulfill those responsibilities. As Mrs. Norris said, "I'm expected to act as the mother of a regular family would act with her own children. I'm responsible for their care, for cooking for them, for washing clothes, etc. like the mother of the family." The women do not have other employment. Caring for the home and children is a round-the-clock job. (Apparently, the men have other regular employment). The contract provides that out of the total payment to the couple the Woman will take a set amount per month "as remuneration for her services". The breakdown of the monthly allowance in the appendix to the contract refers to this amount as a "salary paid to the group home mother" and notes that Canada Pension, Unemployment Insurance and Income Tax deductions are made from that sum.

6. Aside from the salary, the parents receive amounts of money to cover most, if not all, of their expenses related to the home and children in their care. Some furnishings, including linens, are provided by the respondent. The parents are reimbursed for clothing expenditures and dental and educational bills. In addition, spending and personal grooming allowances for the children are included in the per diem "foster board rate". The breakdown of the monthly allowance in the Appendix includes an amount to cover "rent payment or contribution to mortgage payment and taxes", and amounts for utilities, parent relief and extra treats for the family.

7. The parents report to a social worker employed by the Society who comes into their home whenever he considers it necessary. It appears that the social worker makes the final decisions about important matters involving the children's needs and future. He discusses the needs of the children and any problems in the home with the parents and they attempt to achieve together programs and solutions which are best for the child. In day-to-day matters and within the home the parents exercise the same authority over the children that parents normally do, subject to the Society's inspection and their duty to maintain "adequate standards of care". Time off is left to the parents, provided the Society is advised in advance, and the parents are "expected" to plan one day off per week. It is their responsibility to obtain and pay someone on that day from their parent relief allowance. The contract provides that the parents cannot have resident visitors for over three days without the permission of the Society.

8. The Society employs and pays domestic help who work in the group homes. The parents direct the work they do in the home, and report any problems to the Society. They have, however, no authority to fire. In the Receiving home, which houses up to eleven children, two child care workers employed by the Society work shifts assisting Mrs. Schell, joining in activities with the children, and doing paper work. Mrs. Schell has no authority to hire or fire, and time off is arranged "through the office" although she felt she could give someone half a day off without consulting anyone in special circumstances.

9. The British Columbia Labour Relations Board has recently dealt with a case which parallels in its essentials the case before us. In *Vancouver Resources Board*, [1977] 1 Canadian LRBR 358, the B. C. Board found that house parents in Homes for Understanding Teenagers (HUT) run by the Vancouver Resources Board were employees within the meaning of the British Columbia Labour Code. In that decision, the relationship between the house parents and the employer was described by Chairman Weiler as follows:

“The HUT houseparents earn their living for their labour as payment for services which they provide themselves rather than as a return on capital invested, entrepreneurial skills, or a staff organization of their own. Their “parenting” services are a central component in one of the child care programs of the VRB. The services are required on a continuing, year-round basis. The HUT houseparents are integrated into the VRB structure, subject to monitoring and direction by VRB staff. In return for their full-time efforts, houseparents receive their entire yearly income from the VRB.”

The Board finds that the receiving and group home mothers in this case are involved in the same kind of relationship with the respondent and that this relationship is one of employer-employee.

10. Our conclusion is not affected by the existence of a written contract between the mothers and the respondent. The Board in determining whether an employment relationship exists looks to the substance of the economic relationship more than to matters of form which may obscure its reality (See *Superior Sand, Gravel and Supplies Ltd.*, [1978] OLRB Rep. Feb. 119) As indicated, the reality of the relationship is that the mothers are, as Mrs. Norris stated, economically dependent upon the respondent. (It should be emphasized that the application before us involves only the wives who, by contrast with their husbands do not perform work for others outside the home. As stated, their work for the respondent requires a full-time effort).

11. Nor is our conclusion affected by the fact that the mothers care for the children in their own homes as opposed to a home provided by the respondent. The evidence indicates that the mothers are not in the business of providing child care services in order to make a profit on their property. The evidence is that the mothers, like other employees, receive a salary as remuneration for their labour and that they receive specific amounts to compensate them for the expenses associated with the operation of their premises – premises over which the Society exercises considerable control – in respect of their suitability and availability for children and use by resident visitors.

12. The use by the mothers of replacement personnel does not alter the essential nature of their relationship with the respondent. The evidence is that the respondent, in effect pays the help through its provision of a parent relief allowance in the monthly payments. In short, the use of replacement help does not increase the mother’s capacity for profit. It merely assists them in the performance of their work as parents.

13. Any authority exercised by the mothers over the housekeepers employed by the respondent is insufficient to support a finding that the mothers exercise managerial functions.

14. The Board finds that Mrs. M. Moran, Mrs. M. Schell, Mrs. L. Norris, Mrs. Westbury, Mrs. Trafford and Mrs. O’Rourke are employees of the respondent for purposes of The Labour Relations Act.

0176-78-JD Mac J. Brian Mechanical Ltd., (Complainant), – v –
 International Association of Bridge, Structural and Ornamental Ironworkers,
 Local 700, United Association of Journeymen and Apprentices of the
 Plumbing and Pipefitting Industry of the United States and Canada, Local
 552, Donald Stewart and James Phair, (Respondents).

Jurisdictional Dispute – Discussion of criteria for resolution of dispute – Whether new collective agreement with private resolution mechanism effects present case – Whether Board should limit its direction.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Charles F. Clark and Richard Brian for the complainant; L. C. Arnold, Dick Pearn and Jerry Boyle for Local 552; Robin E. Cumine, Q.C. and Willian Jemison for the Ontario Erectors Association.*

DECISION OF THE BOARD; December 22, 1978

1. The complainant has requested the Board pursuant to section 81(1) of The Labour Relations Act to issue a direction with respect to certain work which was the subject matter of an interim order by this Board on May 1, 1978. The work in dispute is "all work associated with the unloading and handling of equipment and materials associated with the installation of an inline filter, pumps, exchangers, coolers, meters, dehydrators, piping, valves and appurtenances, which includes supports and hangers, at the complainant Mac J. Brian Mechanical Ltd.'s job at Dome Petroleum, 4300 Matchette Road, Windsor". The complainant asks that the Board issue a direction which confirms the interim order which was issued previously in this matter and which awarded this work to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 ("Local 552"). Local 552 supports the complainant in this request.

2. Prior to the hearing of this direction on the merits, the Board received a letter from the Ontario Erectors Association (The "Association") which is the employer bargaining agency, both designated and accredited with respect to employers of members of the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 ("Local 700"). At the hearing the Board entertained the representations of the parties and the Association and ruled that having regard to the decision of the Board in the *Gryd Construction Inc.* case, [1975] OLRB Rep. 230, the Association was entitled to participate in this proceeding. The Board noted, however, that the Association participated in this proceeding as it found it at the stage of its first appearance. The Board heard evidence on the merits of this request for a direction from Malcolm Brian, the president of the complainant, and from Jerome Boyle, who until recently was the business agent of Local 552. In addition the Association filed a copy of its most recent collective agreement which became effective on May 1, 1978, that is to say, after the date of the filing of this complaint.

3. Mr. Brian has been the president of the complainant for the five years that it has been in business. The witness gave evidence that the complainant is a party to a collective

agreement with Local 552 and that, from the point of view of April 26, 1978, the date on which this complaint arose, the most recent collective agreement expired on April 30, 1978. The complainant is not a party to a collective agreement with any other trade union. The complainant is a party to a contract with Dome Petroleum which calls for the installation of piping equipment, controls and insulation and for the installation of other miscellaneous items used in Dome Petroleum's operations in Windsor. These facilities are used in the storage of propane gas and for related underground storage facilities.

4. Mr. Brian informed the Board that it is the complainant's practice to have the work in dispute performed by its own mechanics who are members of Local 552. The complainant's preference in the assignment of the work in dispute is that the work be assigned to members of Local 552. This preference is based upon the fact that members of Local 552 possess the skills required for the performance of the work in dispute and also because of the economy and efficiency in using members of Local 552. More particularly, it was the complainant's position that the skills required to perform the work in dispute include a knowledge of the weight of the items to be lifted and installed, including a consideration of weight distribution, the capacities of various apparatus and ground conditions, the capacities and proper applications of hooks, eyes, chokers and various hangers and support mechanisms and a knowledge of the overall mechanical system to be installed, including a conceptual knowledge of the proper locations and orientation of equipment, including final level positions and the positioning of inlet and outlet connections.

5. The witness gave evidence that the skills referred to previously can be possessed by any skilled mechanic as it relates to their specific field and trade. He gave evidence that the mechanics in the complainant's employ who have performed this work form them have all of these skills, particularly as they apply to the proper completion of the contracts made and completed by the complainant. The witness informed the Board that it was the complainant's position with respect to economy and efficiency that the work in dispute, by reason of its nature, is best performed by members of Local 552. He listed the following factors: a) the complainant's mechanics are fully conversant with the overall dimensions of the mechanical project and the intended use of all equipment; b) the complainant's mechanics are on site at the time whenever the work is performed and it therefore does not entail recruiting outside forces to come on to the job site to set up and perform the work in dispute; (The witness emphasized that the complainant's mechanics by being on the job site are aware of the conceptual framework involved in connection with the work to be performed and thus may schedule such work into their daily programme without relying on a third party.) c) a great majority of the work in dispute can be performed by the complainant's own hoisting equipment which affords greater flexibility in time scheduling; d) the complainant has in its employ several mechanics who hold construction safety association hoisting certificates and is aware of the actions of Local 552 in providing continuing education for journeymen and apprentices in this field as it relates to the installation of the work in dispute; e) the complainant has been able to perform, through the use of its own mechanics as members of Local 552, a large volume of the work with no incidence of damage to equipment, injury to personnel and the proper completion of a large number of projects, and f) the ability of the complainant to complete a large volume of work, free of incident in the past.

6. In cross-examination, Mr. Brian confirmed that the complainant had always assigned the work in dispute to members of Local 552. He also agreed that during the five

years of the complainant's existence it had been engaged in approximately fifteen to twenty similar projects and had always assigned the work to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. All of these projects were in Essex County. When cross-examined by the Association, the witness insisted that the work in dispute was not originally subcontracted to Ranta Enterprises and that the work assignment was never changed. Mr. Brian stressed that at the time of the purchase order Ranta Enterprises was made aware that certain equipment required input by members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

7. In giving evidence Mr. Boyle referred to Article 40 of the relevant collective agreement between Local 552 and the Mechanical Contractors Association of Windsor and identified the portion of the jurisdiction of the United Association which is affected by the work in dispute. Article 40 of the collective agreement reads in part as follows: "When equipment of an extraordinary heavy classification is to be handled or placed then the employer may arrange to obtain the services of necessary equipment or machinery to perform such work. However, it is agreed that journeymen and apprentice members of the union shall unload, load, handle, distribute, place or install any materials or equipment of the union trade jurisdiction and furthermore only journeymen and apprentice members shall be permitted to use the tools of the trade. The United Association work jurisdiction specifically includes the dismantling, salvaging and junking related to dismantling where under the control of the contractor". The witness also referred to paragraphs 18 and 22 of Article 40, Schedule "B" of this collective agreement, which relates to the jurisdiction of Local 552. Article 18 states that "The handling, assembling and erecting of all economizers, super-heaters, regardless of the mode or method of making joints, hangers and erection of same". Article 22 states that "The setting, erecting and piping of instruments, measuring devices, thermostatic controls, gauge boards and other controls used in connection with power, heating, refrigerating, air conditioning, manufacturing, mining and industrial work". Mr. Boyle testified regarding his experience of twenty years in the plumbing trade in the Windsor area. He gave evidence that he is not aware of any instance where equipment regarded by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as its equipment has been handled by ironworkers. The witness referred to a list of projects in the Windsor area between 1965 and 1978 and admitted that there were several others that he had not referred to. He referred at length to a list of major projects involving hoisting of equipment installed by personnel of Local 552 in Essex County generally. The witness referred to the skills which are necessary to perform the work in dispute and expressed the view that the members of Local 552 possessed the necessary skills. He informed the Board that such skills are acquired both by on-the-job training and by the attendance at training programmes. Mr. Boyle informed the Board that Local 552 has facilities for training its members and that in addition, a rigging course set up by the Canadian Safety Association is available. This course which encompasses some 33 hours is entirely devoted to rigging and handling. The witness stated that lack of skill has never been a problem in the Windsor area in so far as members of Local 552 are concerned. He stated that he is not aware of any situation where the skills of the members of Local 552 have been called into question. Mr. Boyle also introduced into evidence the constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and referred to the broad trade jurisdiction which is set forth therein and claimed by what trade union.

8. In cross-examination the witness stated that the course on rigging has been available for between ten and twelve years. He agreed that he is not personally familiar with all of the projects on the list which was filed with the Board. He stated that he based his knowledge on his own observations, upon what he was informed about some of the projects, by what he knows from copies of the minutes of job mark-ups and by speaking to the foremen on the jobs. He was personally familiar with about half of the projects on the list which he referred to in evidence.

9. The complainant in its representations to the Board stated that it was attempting to complete a contract for Dome Petroleum at 4300 Matchette Road in Windsor and that its preference was to have the work performed by members of Local 552. The complainant stated that it found that these members had the necessary skills and that it was more economical and more efficient to employ members of Local 552. The complainant asked that the interim order with respect to the assignment of work be continued and that a direction be issued in favour of the members of Local 552.

10. Local 552 referred to the constitution which had been introduced in evidence and referred to the very broad jurisdictional claims contained therein in section 3 and which stated that their jurisdiction embraced everything to do with plumbing and pipefitting. Local 552 emphasized that there were no inter-trade union agreements with respect to the work in dispute and argued that Local 552 and the Mechanical Contractors Association had addressed their minds to the importance of the work in dispute by referring to it in their collective agreement. It was argued that the collective agreement which was filed by the Association was irrelevant because it was not in effect at the time that the complaint arose with respect to the work in dispute. The area practice and the complainant's practice of assigning work to members of Local 552 was stressed by Local 552. It was also pointed out that Mr. Boyle was personally familiar with half of the jobs on the list of projects which was introduced in evidence. Local 552 asked the Board to accept Mr. Boyle's evidence as the best evidence that was available. It was emphasized that members of Local 552 have the necessary skills and that the complainant had given evidence regarding the economy and efficiency of using members of Local 552 who were already on the site. Local 552 summarized its position that each and every criteria where the Board uses to determine work assignments favoured the assignment of the work in dispute to members of Local 552 and asked that the interim order be confirmed.

11. The Association expressed concern about the Board's jurisdiction to entertain this application in light of its current collective agreement. This collective agreement, of course, became effective after the date of the filing of this complaint. This current collective agreement, unlike its predecessor, has now been changed to give jurisdiction over jurisdiction disputes to the Impartial Jurisdictional Disputes Board. The Association referred to section 81(14) of the Act. On the question of the merits, the Association urged that the direction should be limited to the express work on the express site and for the express employer.

12. The Board has previously dealt with arguments regarding its jurisdiction in this matter in a decision dated November 21, 1978. The Board finds for the reasons set forth in that decision and for the reasons more generally set forth in the *Adam Clark Limited* case, 76 CLLC ¶16,053 that there is nothing in the material before it which precludes it from entertaining this request for a direction. In the *Anchor Shoring Limited* case, [1974] OLRB

Rep. Aug. 528, the Board listed the various criteria which it considers in making an assignment of work. These criteria are a) collective bargaining relationships; b) skill and training; c) considerations of economy and efficiency; d) employer practice and e) area practice.

13. On reviewing the evidence before the Board, it is quite clear that only Local 552 has a collective bargaining relationship with the complainant and that, moreover, under the terms of the collective agreement between them, the parties have set forth that the work in question belongs to and falls within the jurisdiction of Local 552. It is quite clear that the members of Local 552 have the necessary skills and training to perform the work in dispute. With regard to considerations of economy and efficiency, the evidence of Mr. Brian quite clearly establishes that it is more economical and efficient to employ members of Local 552 rather than any other employees to perform the work in question since they are already on the job site. The practice of the complainant is to assign the work in dispute exclusively to members of Local 552. The evidence before the Board establishes that the area practice not only in the Windsor area, but in the County of Essex, is in favour of the work being performed by members of Local 552.

14. The Board finds that the evidence with respect to all of these criteria favour the claim of Local 552 to the work in dispute. The Board notes that Local 700 initially claimed the work in dispute. However, Local 700 previously withdrew from this complaint and there is no evidence before the Board which in any way supported a claim by Local 700 to the work in dispute.

15. Having regard to the foregoing, the Board makes the following direction:

The complainant Mac J. Brian Mechanical Ltd. shall continue to assign all work associated with the unloading and handling of equipment and materials associated with the installation of an inline filter, pumps, exchangers, coolers, meters, dehydrators, piping, valves and appurtenances, which includes supports and hangers, at the complainant Mac J. Brian Mechanical Ltd.'s job at Dome Petroleum, 4300 Matchette Road, Windsor, to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552.

1144-78-U Masonry Contractor's Association (Toronto – Incorporated), Zachary Devuono Limited, Eldorado Masonry Limited, S & E Massaro Limited, Di-Ferro Construction Limited, Ontario Masonry Co. Ltd., Parent Masonry Limited, 360557 Ontario Limited carrying on business under the name of Shield Masonry Co., Top Masonry Company, Q & G Masonry Company Limited carrying on business under the name of Twentieth Century Masonry, Valley Forge Construction Limited, Vamcos Construction Limited, Venice Masonry Contractors Limited, (Complainants), – v – Toronto Construction Association (General Contractors' Section), Toronto Building and Construction Trades Council, International Union of Bricklayers and Allied Craftsmen, Local 2, Metropolitan Toronto Apartment Builders Association, Runnymede Development Corporation Limited, Harbridge and Cross Limited, The Cadillac Fairview Corporation Limited, Rule-Bilt Limited, Nelkin Construction Limited, David Yan Construction Limited, Ranfas Engineering & Construction Ltd., Sajonor Holdings Limited (Economy Construction), The Metropolitan Toronto Housing Company Limited, McNamara Engineering Limited, Van Bots Construction Co. Ltd., Traugott Construction Limited, George Wimpey Canada Limited, Olympia & York Developments Limited, Consolidated Building Corporation Limited, Tower Glen Developments Limited, David Johnson, John Zanussi, Clive Ballentine, (Respondents), – v – The Board of Education for the City of Toronto, (Intervener # 1), – v – Bricklayers' Masons Independent Union of Canada, Local 1, (Intervener #2).

S-123-S-79-Construction Industry – Unfair practice allegation involving allegedly illegal conduct in connection with no subcontracting arrangement – Alleged illegal interference with complainants in order to enforce no subcontracting arrangement – No illegal interference with employer organization – No direction made “in the air” when evidence does not establish immediate wrong doing.

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and M.J. Fenwick.

APPEARANCES: *Brian Sherman and Leonard Corrado for the complainants, A. Minsky and L. Greenspoon for Toronto Building and Construction Trades Council, International Union of Bricklayers and Allied Craftsmen, Local 2, David Johnson, John Zanussi and Clive Ballentine; Bruce Binning and Karl Mallette for Metropolitan Toronto Apartment Builders Association, The Cadillac Fairview Corporation Limited, McNamara Engineering Limited, George Wimpey Canada Limited, Consolidated Building Corporation Limited and Tower Glen Developments Limited; S.C. Bernardo and J. Trim for Toronto Construction Association (General Contractors' Section), Runnymede Development Corporation Limited, Harbridge and Cross Limited Rule-Bilt Limited Nelkin Construction Limited, David Yan Construction Limited, Ranfas Engineering & Construction Ltd., Sajonor Holdings Limited (Economy Construction), Van Bots Construction Co. Ltd., Traugott Construction Limited and Olympia & York Developments Lim-*

ited; J.K. Horsley for The Metropolitan Toronto Housing Company Limited; no one appearing for intervener #1; N.A. Endicott, John Lang and J. Meiorin for intervener #2.

DECISION OF THE BOARD; December 13, 1978

1. This is a complaint under section 79 of the *Labour Relations Act* alleging a violation of sections 57, 61, 63 (1), 65, 67, 123 of the Act.

2. The complainants request from the Board the following forms of relief:

- (a) an order directing the respondents or any or all of them to refrain from threatened or actual harassment of or other interference with the complainants, their members, colleagues, employees or any of them in respect of a right to become and continue to be members of the Masonry Contractors' Association (Toronto-Incorporated) and employers of members of B.M.I.U.C. Local 1;
- (b) an order directing the respondents or any of them to refrain from any participation, threatening or supporting of unlawful pickets;
- (c) an order directing the respondents or any of them to refrain from any participation, threatening or supporting of unlawful strikes;
- (d) an order directing the respondents or any of them, their colleagues and members to refrain from entering into or continuing under agreements, which restrict the right of the complainants to perform certain masonry work;
- (e) an order declaring unlawful and contrary to The Labour Relations Act, agreements or clauses or terms thereof entered into between trade unions and councils of trade unions on the one hand and owner-builders or general contractors on the other hand which result in exclusion of the complainants and their colleagues from a certain sector of the masonry industry and by doing so affect, in a negative fashion, their right to employ members of the B.M.I.U.C., Local 1 (and honour their collective agreement in that regard) and the right to membership in the MCAT free from harassment and coercion.

3. The statement of material facts upon which the complainants intend to rely contains a long list of incidents relating to the exclusion of members of the Masonry Contractors' Association (Toronto-Incorporated) from certain construction work because of their collective bargaining relationship with Bricklayers, Masons Independent Union of Canada, Local 1, a trade union not affiliated with the respondent Toronto Building and Construction Trades Council (the Council). The statement of particulars alleges that arrangements and policies restricting the contracting-out of work have been established to the detriment of the Masonry Contractors' Association (Toronto-Incorporated) [MCAT] and that the members of MCAT have either not been given the opportunity to bid on certain construction jobs or that they have not been allowed to carry out contracts where they have been the successful

bidder. In addition, the particulars allege that strikes and picketing, threats of strikes and picketing, and other pressure have been brought to bear in order to exclude the members of MCAT from certain construction work. Finally, it is alleged that one of the directors of MCAT has resigned and become associated with a firm having a collective bargaining relationship with the Bricklayers, Masons and Tilesetters Union, Local No. 2, Ontario, a member of the respondent council.

4. The particular alleged in this case overlap to a substantial extent the facts before the Board in a recent complaint, *Bricklayers, Masons Independent Union of Canada, Local 1 and Metropolitan Toronto Apartment Builders Association, Toronto Building and Construction Trades Council*, Board File 0161-78-U. At the outset of the hearing the Board was faced with a preliminary motion that this complaint be dismissed since the issues raised by it were the same as those decided by the Board in File 0161-78-U. After hearing argument on this preliminary motion, the Board ruled that the doctrine of *res judicata* could not apply to foreclose the bringing of this complaint. The Board indicated, however, that it recognized that the legal issues in this case closely resembled those already decided by the Board in its earlier decision. In these circumstances, the Board asked the parties to address the question of whether this complaint on its face disclosed any violation of the *Labour Relations Act*, indicating to the parties that it would only proceed to hear the evidence if the facts as alleged could support an argument that a violation of the Act had occurred.

5. Counsel for the complainants submitted that the essence of the complaint was the adverse impact of the alleged conduct on MCAT, and its members. This adverse impact, according to counsel, gave rise to a breach of the Act, the sections of the Act primarily in issue being sections 57 and 61. These sections read:

57. No trade union and no person acting on behalf of a trade union shall participate in or interfere with the formation or administration of an employer's organization.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

6. The incidents in question, according to counsel, amounted to an interference with the administration of MCAT by a trade union, Local 2, and by persons acting on its behalf, including the respondent employer organizations and employers. The effect of these incidents was to undermine what counsel characterized as the "business purpose" of MCAT. It was argued that, if MCAT were excluded from certain fields of business, this would destroy the very reason for the creation of the association. The effect of the incidents alleged not only amounted to the kind of interference prohibited by section 57, but also constituted intimidation or coercion affecting the right of a person to join an employers' organization of his choice in contravention of section 61 of the Act.

7. In reply to this argument it was argued that the exclusion of MCAT members from certain work had nothing to do with the fact that the complainants belonged to a par-

ticular employers' organization but, rather, was related to the union affiliation of those persons employed by the members of MCAT. In support of this argument it was pointed out that, if any members of MCAT were to defect, then by operation of section 43(1) of the Act they would still have a collective agreement with Local 1, and would still be barred from the work in question. The enforcement of sub-contracting provisions, while undoubtedly excluding the members of MCAT from certain work, could not reasonably be characterized as interfering with an employers' organization or the right of a person to join such an organization.

8. To answer the question of whether this complaint on its face could give rise to a violation of the *Labour Relations Act* it is necessary to examine the purpose of the sub-contracting provisions that are commonly found in the construction industry. In *Metropolitan Toronto Apartment Builders Association, supra*, the Board recognized that this type of clause served the legitimate purpose of protecting the work jurisdiction of a trade union, or group of trade unions. In arriving at this conclusion the Board acknowledged that such clauses, not only created a preference for members of a particular union, but that they also give rise to a preference for a particular group of employers.

9. It follows that, on the other side of this coin, other unions and groups of employers may be excluded from the work in question. This effect, however, is not the kind of interference with another union that gives rise to a contravention of the Act. As the Board stated in *Metropolitan Toronto Apartment Builders Association, supra*,

39. This Board concurs with the view that the primary purpose of the sub-contracting clause is to protect a union's claim to a particular work jurisdiction. Can it be said, then, that such provisions interfere with an employees' right to join a trade union of his choice, as protected by sections 58(c) and 61 of the Act? Although employees may be tempted to join a trade union which can provide them with work, this consideration is a recognized fact of life in the construction industry where trade unions have some control over the allocation of work through their hiring halls. The availability of work through a trade union will always operate as an inducement to employees to join a particular union, regardless of the presence of a sub-contracting arrangement. This kind of inducement, therefore, cannot constitute the kind of conduct contemplated by either section 58(c) or section 61 of the Act.

40. Nor can it be said that the sub-contracting clause interferes with another union's bargaining rights contrary to section 56 and 59 of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the *Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and

established in the bargaining process through such means as a sub-contracting provision. Sections 56 and 59 of the Act are intended to protect bargaining rights only, and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 of the Act for the resolution of jurisdictional disputes.

10. Notwithstanding this conclusion, can it be said that the enforcement of sub-contracting provisions interferes with an employers' organization in such a way as to give rise to a breach of section 57, the parallel provision to section 56? While the effect of the sub-contracting clause may be to reduce the economic opportunities of a particular group of employers, a reduction of economic opportunities by itself cannot be construed as constituting the kind of interference contemplated by section 57. Otherwise this section would operate to protect employers' organizations from business competition in general.

11. The added element of the existence of restrictions on sub-contracting can put the case no higher. As the Board has already held, such clauses standing alone are not prohibited by the *Labour Relations Act* as they serve the legitimate purpose of protecting a union's work jurisdiction. The reduction of business opportunities because of the operation of sub-contracting clauses could be no more a breach of section 57 than would be the adverse economic effect of normal business competition upon an employers' organization. This complaint on its face, therefore, could not give rise to a violation of section 57 of the Act.

12. The same reasoning applies to the complainants' argument that the complaint gives rise to a violation of section 61. Conduct that deprives an employers' organization of business opportunities might either result in the defection of member, or discourage prospective members from joining. Such conduct by itself, however, cannot be construed as the kind of conduct prohibited by section 61. If this were the case all business competition adversely affecting an employers' organization would fall within the ambit of section 61.

13. It is evident, as well, that the sub-contracting clause is not directed at compelling persons to either join or to refuse to join an employers' organization. The purpose, as we have stated, is simply to protect a union's work jurisdiction by requiring that work be sub-contracted only to employers with which it has a collective bargaining relationship. It is not the existence of the employers' organization but the fact that its members bargain with a different union that causes the sub-contracting clause to be enforced. Choice of union, however, is a right belonging to employees under the Act, and not a matter left to employers. An employer cannot choose a union by either joining an employers' organization, or leaving that organization. The enforcement of sub-contracting clauses, therefore, cannot be construed as interfering with the right of a person to belong to an employers' organization in contravention of section 61.

14. Some comment should also be made on those particulars alleging the occurrence of strikes and picketing, and the threat of such action. If such methods are being used to enforce sub-contracting clauses, and they contravene the provisions of the Act restricting strike and picketing activity, then these methods can be enjoined by the Board through the exercise of its remedial authority under section 123 of the Act. The fact that, on occasion, illegal means may have been used to enforce sub-contracting clauses, however, does not serve

to make these clauses illegal in themselves. While the Board can restrain any illegal methods by which such clauses are enforced, it cannot strike down the clause itself. The Board, therefore, could not grant that part of the relief requested by the complainants that seeks to restrain the use of sub-contracting clauses.

15. The complainants are also requesting a general order restraining any and all unlawful strike and picketing action on the part of the respondents. Although the facts might reveal some incidents of illegal strike and picketing, it is clear that the complainants are not seeking to enjoin these particular incidents but, rather, seeking a restraining order "in the air". It is not the practice of the Board to issue general directions restraining conduct that is neither apprehended nor imminent. General prohibitions of this kind are essentially legislative in nature, and can already be found in the *Labour Relations Act*. Where those prohibitions in the Act relating to strikes and picketing are breached, immediate recourse to the Board's remedial powers under section 123 is available to any interested person. The practice of the Board is to act promptly on such applications in order to keep any damage flowing from such actions to a minimum. The complainants, therefore, by requesting a direction "in the air", are seeking a type of remedy that is not available from the Board.

16. Accordingly, for the reasons given above, this complaint is dismissed.

0274-78-U United Steelworkers of America, (Complainant), – v – Radio Shack Division of Tandy Electronics Limited, (Respondent).

S.79 – Interference with Trade Union – Employer failure to reinstate employee to former position and continued harassment held to be failure to comply with Board order.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER, W. F. RUTHERFORD; December 4, 1978

1. This is a proceeding under section 79(5) of The Labour Relations Act. The complainant notified the Board by letter dated October 3, 1978 that the respondent had failed to comply with the Board's Order of September 27, 1978 insofar as that Order required the reinstatement in employment of the grievors Stephen Gradon and Henry North, Jr.

2. The Board's decision of September 27, 1978 set out in paragraph 3 thereof the following:

3. The Board finds that the respondent has acted contrary to section 58(a) of the Act in its dealings with Henry North, Jr. and Stephen Gradon. The Board orders that Henry North, Jr. and Stephen Gradon be reinstated forthwith in the jobs they occupied in the respondent's employment prior to May 3, 1978 with the terms, conditions and benefits appli-

cable thereto unaffected by their discharges on May 3, 1978. The Board further orders that the respondent compensate Henry North, Jr. and Stephen Gradon for the period between May 3, 1978 and the time of their reinstatement, and in the event the parties are unable to agree on the quantum of compensation the Board will remain seized of the matter.

3. Pursuant to the complainant's letter of October 3, 1978 the matter was set down for hearing to determine whether there had been a failure in compliance by the respondent.

4. After the commencement of the hearing and before the complainant was called on to adduce evidence in regard to the alleged non-compliance insofar as it affected Henry North, Jr., the complainant sought leave of the Board to withdraw its allegation of non-compliance insofar as it related to the issue of whether or not Henry North, Jr. had been reinstated following the Board's order. The complainant's request was motivated, according to the statement of counsel by the fact that North, Jr. had found suitable employment with another employer and counsel urged that his request for withdrawal be without prejudice to its right to introduce allegations based on the same set of facts in other proceedings before the Board.

5. Counsel for the respondent argued that the complainant was not entitled to withdraw once the hearings had commenced and that the respondent was entitled to a finding that it had not been in non-compliance with the Board's Order, and that the Board should dismiss the complaint of non-compliance so far as the reinstatement of Henry North, Jr. was concerned.

6. The Board issued an oral ruling on the matter, which at the request of counsel for the respondent is reduced to writing as follows:

"The Board is of the opinion that the request of the applicant to withdraw its allegation of failure by the respondent to comply with the Board's Order of September 27, 1978 insofar as the reinstatement in employment of Henry North, Jr. is concerned is granted.

The Board grants such permission without prejudice in respect to the right of the complainant to introduce similar allegations for other purposes and in other proceedings, but obviously the determination of any such right is a matter not for this panel but for some other panel."

7. Apart from the issue of reinstatement required by the Board's Order of September 27, 1978, that Order also required the respondent to compensate North, Jr. and Gradon for the period between May 3, 1978 and the time of their reinstatement. As is usual for the Board in such circumstances, the matter of settling the amount of compensation due was left to the future agreement of the parties with the Board remaining seized of the matter in the event the parties could not agree.

8. At the opening of the hearing in the instant matter, counsel for both parties represented to the Board that there had been an exchange of correspondence relative to the quantum of such compensation and it appeared that subject to a final determination of one

of the bases for the calculations that the parties would be able to settle the matter without the intervention of the Board. Later in the hearing counsel for the respondent took the position that there would be no mutual agreement between the parties and that the Board should exercise its jurisdiction to settle the issue of quantum. The Board was of the opinion that this issue was not part of the instant non-compliance proceedings but in the interests of expedition and, this panel being seized of the matter, an oral finding was made which at the request of counsel for the respondent is now reduced to writing as follows:

"The Board finds that the net amounts due pursuant to the Board's Order of September 27, 1978 to the grievors, Gradon and North, Jr. for the period May 3, 1978 to September 28, 1978 are:

\$1,150.15 in respect to Henry North, Jr.

\$1,301.65 in respect to Stephen Gradon.

The above amounts are net of amounts received by North, Jr. and Gradon from the Unemployment Insurance Commission as outlined in a letter dated October 19, 1978 directed to Mr. J. Hayes by Mr. Donald McKillop.

It is noted by the Board that the net amounts set out above are subject to further adjustment in the event only that the Unemployment Insurance Commission makes additional claims for which the respondent is liable.

It is also noted that the compensation to the grievors for the period May 3, 1978 – September 28, 1978 is not a part of the present proceedings initiated by the complainant's letter of October 3, 1978 dealing with the alleged non-compliance by the respondent of the Board's Order."

9. The remaining issue for this Board is whether there has been a failure by the respondent to reinstate Gradon in the job he occupied in the respondent's employ prior to May 3, 1978 with the terms, conditions and benefits applicable thereto unaffected by his discharge of May 3, 1978.

10. Prior to his discharge of May 3, 1978, Gradon was employed by the respondent as a Maintenance Man and along with his foreman, Vernon, comprised the respondent's Maintenance Department. The functions of that department were outlined for the Board at an earlier hearing through the submission of a document by the respondent headed "Maintenance – Routine and Work Orders", and which sets out that routine maintenance schedules would be maintained for all warehouse materials handling equipment, miscellaneous fixed assets which are a part of the building, building protective systems, miscellaneous equipment associated with warehouse production and the "building grounds and building appurtenances". The general location within which Gradon performed these duties can be identified as "214 Bayview" which was then the site of the warehouse production operation.

11. At sometime after May 3, 1978 and prior to October 2, 1978 when Gradon re-

ported for work pursuant to a telegram received from the respondent, the warehouse production operation shifted to a new location known as 279 Bayview. As of October 2, 1978 there still remained some 10 employees at 214 Bayview (to which Gradon was assigned) who were also subsequently transferred to 279 Bayview in about a week's time.

12. On reporting for work on October 2nd, Gradon was provided with a written job description headed "Maintenance Workers – Outside". This job description was developed by the superior of Gradon's immediate boss and approved by a Vice-President of the respondent, Clark, and it contained no work elements relating to warehouse handling equipment, miscellaneous fixed assets which are a part of the building, building protective systems, miscellaneous equipment associated with warehouse production all of which had comprised the core function of Gradon's previous job. The new job, as its heading indicates, concentrates on grounds and exterior maintenance and "inside and outside cleaning and maintenance duties in and around buildings owned and leased by Radio Shack (other than at 279 Bayview)".

13. It is patent from this new job description that its core function did not in any way resemble the core function of the job done by Gradon prior to May 3, 1978. It is true that certain work elements in the new description had been occasionally performed by Gradon in the former job as incidental to his major functions, but in the new job they became major and not incidental functions. Gradon testified that his former job is being done at 279 Bayview by another employee and no evidence was called by the respondent to contradict this. Counsel for the respondent argues that the job being done by Gradon prior to May 3, 1978 was performed at 214 Bayview and that the physical location as well as work elements is an essential element of the Board's reinstatement order: the respondent further argues that because warehouse production operations have been transferred to 279 Bayview and are not being carried on at 214 Bayview, it is impossible for the respondent to comply with the Board's Order as to both work content and physical location and it therefore chose to comply with the physical location element.

14. We fail to understand how the respondent imports into the language of the Board's Order, the requirement of physical pinpointing the work area. To endeavour to pinpoint the actual site where a function is performed such as a building, or a building floor as a sine qua non to the identification of the "job" makes no sense to us. In our view, the job is the work elements and the physical location is of no consequence so long as it is within an area to which one could reasonably expect an employee could make himself available to perform his function. No doubt if the job is re-located beyond the geographic area within which it is reasonably accessible to the employee one might conclude that for all practical purposes the job had been eliminated. But that would be a conclusion based on reasonable accessibility and does not bear at all on the existence of non-existence of the job. Certainly there is no question here but that the new location of the job is readily accessible to the employee.

15. It is therefore our finding that there was a failure by the respondent to comply with the Board's Order of September 27, 1978 in that the respondent has not restored Gradon to the job he occupied as of May 3, 1978 and which is now performed at 279 Bayview.

16. Gradon continued in the respondent's employ performing the job of Maintenance Worker – Outside between October 2, 1978 and October 18, 1978 at which time he, by letter, notified the respondent that:

"As a consequence of the existing situation, I will not accept the present assignment which is in violation of the Ontario Labour Relations Board order. Until my present assignment is changed in compliance with the order, I have no alternative but to seek temporary substitute employment elsewhere."

17. The respondent argues that this action of Gradon, in withdrawing his services, frustrates the employer in complying with the Board's Order; and that since, at the time Gradon took the step, a hearing had already been scheduled to consider the matter of compliance his action was premature and tantamount to making himself subject to discharge and that he was so discharged. The complainant admits that if Gradon's conclusion that the Board's Order had not been complied with was ultimately determined to be wrong he may well have created circumstances justifying the employer terminating his employment.

18. Gradon testified that on October 4th, he made a copy of the Board's decision available to his immediate supervisor, Frankcom coupled with the request for his "old job back" and that on that same day he renewed that request to Frankcom's superior, DeWitt. He further testified that he renewed these requests to both these representatives of the respondent on October 13, 1978. On October 4th, DeWitt in response to Gradon's statement that "there's still changing batteries and working on machines" replied that "Steve McCulloch and the boys are doing fine. They are on top of everything" and that he would have to refer it to Distribution and see what their lawyers could do about it. On October 13th, DeWitt's response to Gradon's renewed request that "there's another guy back there doing my job and I should have it back" stated, "I can't very well put him out of work".

19. In the Board's view Gradon in presenting himself for employment on October 2nd, and in accepting the assignments given him between October 2nd and 18th, and in endeavouring to have his work assignments brought within the terms of the Board's Order, through discussions with his superiors, had acted with mature discretion and had done everything which could be reasonably expected of him to facilitate an implementation of the Board's Order. The respondent employer, on the other hand, was embarked on a deliberate course of devising work assignments for Gradon such as would isolate him from contacts with other bargaining unit employees, and it is this course which is at the root of the failure to restore Gradon to his previous job.

20. Gradon's withdrawal from the respondent's employ on October 18, 1978 may be a factor to consider in respect to his obligation to mitigate damages, but, we know of no obligation on Gradon to continue to make himself available for employment with the respondent under circumstances other than would be in compliance with the Board's Order. The respondent has failed, since the date of the Board's Order, to recognize its non-compliance and in our view such failure was continuing during the hearing despite a purported termination of Gradon's employment initiated by the respondent; such purported termination cannot, in our view, be permitted to dissolve the, as yet unfulfilled, obligation of the respondent to reinstate Gradon in the job he occupied as of May 3, 1978.

21. Accordingly, acting under section 79(5) of the Act, the Board hereby directs the Registrar to file a copy of the Board's determination of September 27, 1978 in the office of the Registrar of the Supreme Court.

22. Counsel for the respondent requested that any filing in the Supreme Court be withheld for a period of two weeks to permit the respondent to perfect an application for judicial review. The Board is not persuaded that, in the circumstances of this case, it should interrupt its processes as requested.

23. Respondent's counsel also requested an order be directed to all persons to cease interference with the respondent in implementing the Board's Order. This is a very broad, general request; but in any event the Board finds no evidence of any interference with or obstruction to the respondent's compliance on which such an order could be founded.

DECISION OF BOARD MEMBER, W. H. WIGHTMAN:

1. From my viewing of the evidence it seems clear the work assigned Gradon from October 2nd was concerned with the cleaning up and clearing out of activities at 214 Bayview and that, as such, it bore little resemblance to his earlier maintenance assignments. At the same time I feel it should be noted that he was paid the same rate as McCulloch, others engaged in maintenance work and, indeed, he was given an increase in pay along with the other maintenance employees.

2. It should also be noted that the entire operation is predominantly one of warehousing and distribution as opposed to manufacturing. As such the maintenance activities bear little comparison with those to be found in manufacturing operations. Whereas in the later type of operation the emphasis is likely to be found on machine maintenance and repair, in the case of Radio Shack the maintenance entails a much greater emphasis on what might be described as housekeeping activities and I would include the checking, cleaning and charging of batteries in this genre.

3. It may be that Gradon has a basis for contending that someone other than he should have been assigned the work of cleaning up and clearing out the 214 Bayview premises. A grievance to this effect might have succeeded, although it is unclear to me what relief could have been claimed in light of the fact that he was receiving the same pay and benefits as other employees in the maintenance category.

4. I cannot quarrel with Gradon's subjective view that his assignments were degrading and that the company, in the scheduling of his lunch and coffee breaks, was expressing its displeasure with his organizing activities, however it strikes me as naive that he should have expected the relationship with his employer not to have changed as a consequence of his personal efforts to introduce the adversary element which inherently flows from a collective bargaining relationship.

5. In the event, having chosen that course of action I would have thought Gradon's proper course of action would have been to file his complaint and stick with the job until a third party determination had been made.

1227-78-R Christian Labour Association of Canada, (Applicant), – v – **Reid Aggregates Limited**, (respondent), – v – International Union of Operating Engineers, Local 793, (Intervener).

Related Employer – Successor Status – Sales of a Business – Successor employer becoming bound by agreement – Successor subsequently intermingling employees with those of related employer which has similar agreement with same trade union – Board extended recognition clause and thereby raising bar to new certification application.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and M. J. Fenwick.

APPEARANCES: *C. John Vanderlaan and Edward Vanderkloet for the applicant; Robert G. Murray for the respondent; E. A. Ford and B. Knight for the intervener.*

DECISION OF THE BOARD; December 8, 1978

1. The name: "Reid Aggregates Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Reid Aggregates Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.
4. The applicant seeks bargaining rights for all employees of the respondent at its operation in Sarnia, save and except the foreman, supervisory personnel, sales and office staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.
5. The intervener submits that the application is untimely and ought, therefore, to be dismissed. The position of the intervener requires the Board to examine the facts in the light of The Labour Relations Act.
6. The facts are not in dispute. Prior to July of 1978 the respondent company owned and operated a gravel dock on the St. Clair River at Sarnia. It had one employee at that facility and that person was not represented for collective bargaining purposes by a trade union.
7. In July of 1978 Reid Aggregates Limited purchased an adjacent gravel dock then owned by Cope (Sarnia) Limited. Cope also had one employee working on its gravel dock and that individual was represented for collective bargaining purposes by the intervener by virtue of a collective agreement dated May 23, 1978. Since the collective agreement between Cope and the intervener continues in force until the 30th day of April, 1980, the respondent Reid Aggregates became bound by that agreement by virtue of the operation of section 55(2) of The Labour Relations Act.
8. That does not mean that the employee working at the gravel dock previously owned by Reid Aggregates came to be represented by the intervener. If Cope had pur-

chased the Reid Aggregates Limited facility that individual might have been an accretion to the bargaining unit described in the collective agreement between Cope and the intervener, but the reverse is not true. The employee working at the Reid Aggregates Limited gravel dock would not be represented for collective bargaining purposes by the intervener unless the respondent entered into either a new collective agreement or a voluntary recognition agreement to that effect or a declaration to that effect was made by the Board under section 55(6) of The Labour Relations Act. None of those things occurred prior to the filing of this application.

9. The respondent submits that this is a case for the application of section 55(6) and section 1(4) of The Labour Relations Act. Those sections provide as follows:

55(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

10. It is common ground that the respondent Reid Aggregates Limited is under common control and direction with a company known as the Stanley P. Goodfellow Construction Company Limited. Both of those companies have common officers and shareholders. The Goodfellow Construction Company entered into a collective agreement with the inter-

vener on May 23, 1978. That agreement is identical in each and every one of its terms with the agreement later entered into between the intervener and Cope (Sarnia) Limited.

11. According to the unchallenged submission of the respondent there has been an intermingling of the employees of S. P. Goodfellow Construction Limited and the employee working on the gravel dock of Reid Aggregates Limited. The respondent therefore submits that this is an appropriate circumstance for the application by the Board of sections 1(4) and 55(6) of The Labour Relations Act. The intervener supports that submission.

12. In this case both the respondent and the intervener have brought to the Board's attention the application of sections 1(4) and 55(6) of The Labour Relations Act by their written reply and intervention, respectively, filed in response to this application. While those submissions were not made in the strict form of applications for a declaration under those sections, the Board is satisfied, having regard to the labour relations realities of the case, that it may treat the submissions of the respondent and the intervener as though they were applications for relief pursuant to those sections. Neither the substantive rights of the parties nor the discretion of the Board to exercise its remedial authority should, in these circumstances, be circumscribed by the technical formalities of the material filed. (See *Genaire Ltd.* 58 CLLC ¶15,388 (H. Ct.) aff'd 58 CLLC ¶15,416 (C.A.) and section 103 of the Labour Relations Act and section 59 Board's Rules of Procedure). The applicant had notice of the intention of both the respondent and the intervener to rely on sections 1(4) and 55(6) of the Act in these proceedings and participated in the full argument of those issues at the hearing. The Board therefore determines that it should in this case treat the submissions of the respondent and the intervener as applications for a remedial declaration under those sections.

13. The facts are compelling in support of a declaration favouring the respondent and intervener. The intervener holds bargaining rights for the employee of Reid Aggregates Limited working on the newly acquired Cope dock as well as for all of the employees of the related S. P. Goodfellow Construction Limited. Both the employee on the Cope dock and the employees of S. P. Goodfellow Construction Limited are subject to collective agreements with the International Union of Operating Engineers, Local 793 which are identical in each and every respect of their terms. There is, moreover, intermingling of the employee of Reid Aggregates Limited on its original gravel dock and the employees of S. P. Goodfellow Construction Limited who are represented by the intervener.

14. Given the vested right of the intervener in respect of the employee on the former Cope dock the Board is not satisfied that it should in these circumstances declare that the respondent is no longer bound by the collective agreement between the intervener and Cope (Sarnia) Limited. The Board is likewise satisfied that it should not declare that the employee on the original Reid dock and the employee on the former Cope dock constitute two separate bargaining units since to do so would foreclose the right of the single employee on the Reid dock to collective bargaining pursuant to section 6(1) of the Act. That is to say, if the submissions of the respondent and intervener were rejected this application must, in any event, be dismissed insofar as it might relate to a bargaining unit of one employee.

15. Having regard to the facts as agreed the Board finds that the respondent Reid Aggregates Limited and the S. P. Goodfellow Construction Company Limited carry on a related business under common control and direction. The Board further finds that there has been an intermingling of the employee of Reid Aggregates Limited with the employees of S.

P. Goodfellow Construction Limited within the meaning of section 55(6) of the Act. The Board therefore declares, pursuant to its authority under section 55(6)(d) of the Act, that the employees of Reid Aggregates Limited working on the two gravel docks in question are "employees" within the meaning of the recognition clause, being article 1.1 of the collective agreement between the intervener and Cope (Sarnia) Limited dated May 23, 1978.

16. By virtue of that amendment of the bargaining unit in question the intervener holds bargaining rights for the employees who are the subject of this application. The application is, therefore, dismissed.

0299-78-R London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant), – v – **Rest Haven Nursing Home of St. Williams 1974 Ltd.**, (Respondent).

Certification – Employee – Whether subject employees exercise managerial functions

BEFORE. R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Al Campbell for the applicant; Donald J. McKillop, Q.C. and James E. Bowden for the respondent.*

DECISION OF THE BOARD: December 19, 1978.

1. In a decision dated May 31, 1978, the Board certified the applicant under the provisions of section 6(1a) of The Labour Relations Act. In that decision the Board stated that the issuance of a certificate must await an agreement of the parties with respect to the three persons who are in dispute on a determination of their status by the Board. In that same decision the Board appointed a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of the laundry supervisor and the two registered nursing assistants who are supervisors on the 4:00 p.m. to 12:00 p.m. and 12:00 p.m. to 8:00 a.m. shifts.

2. The Board has considered the Report of the Labour Relations Officer and the representations of the parties.

3. While Mrs. Cathy Eveland is referred to by the respondent as a laundry supervisor she refers to herself as a laundry worker. Mrs. Eveland is hourly paid and works from 7:00 a.m. to 3:00 p.m. from Mondays to Fridays. The laundry is performed on a daily basis and during the weekends two high school students operate the laundry. Mrs. Eveland has no authority to hire employees, does not record their hours of work and is unable to grant time off. Her contact with the two students is severely limited. When they first commenced their employment, Mrs. Eveland instructed them and when items were misplaced she leaves notes which point out these errors. Although her evidence with respect to the dismissing of employees leaves much to be desired from a point of view of precision, a fair reading of the

evidence on this question establishes that she does not have the authority to dismiss employees. The Board finds that she has been informed that if the students do not perform satisfactorily then she may inform her supervisor, Mrs. Harding, and the respondent will obtain new employees. The scheduling, such as it is, for the two students is done by Mrs. Harding. Much was made of the fact that Mrs. Eveland calls in a repairman to repair machines and arranged her replacement during a vacation period of two weeks. In our view these two incidents do not indicate any appreciable degree of independent discretion. The machines in the laundry must surely be kept operative on a continuous basis and this is, in our view, a matter of necessity which does not call for the exercise of any independent discretion. The arrangement for the replacement was cleared with Mrs. Harding. Mrs. Eveland would speak to her supervisor, Mrs. Harding, if she had any problems with the students. When the students are on duty they report to the nurse in charge for the day. Mrs. Eveland's authority to order supplies is limited to requisitioning linen. The list is submitted to the owner through the supervisor. It is the owner who makes the decision to purchase the linen.

4. The duties and responsibilities which are exercised by Mrs. Eveland involve a minimum of interaction with other employees. The Board finds that she does not exercise any appreciable degree of independent discretion and that the degree of supervisory duties that she exercises are at the very most considerably less than the responsibilities of a lead hand. The Board finds that Mrs. Cathy Eveland, who is classified by the respondent as a laundry supervisor, does not exercise managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act. Mrs. Eveland is therefore included in the bargaining unit.

5. Lorraine Lynch and Lyn Archibald are employed by the respondent as registered nursing assistants. They do not work on the day shift but rather work between 3:00 p.m. and 11:00 p.m. and between 11:00 p.m. and 7:00 a.m. They do not work on the same shifts at the same time. Mrs. Harding is their direct supervisor. They do not generally work overtime. The respondent employs registered nurses who work on the day shift. A registered nurse is always on call and may be contacted by Mrs. Lynch or Mrs. Archibald when a question arises with respect to the care of the patients and residents. They are "in charge" of the nurses' aides who work with them. The evidence before the Board, however, makes it clear that "in charge" refers primarily to being responsible for the welfare of the patients and residents rather than to supervising the nurses' aides.

6. Mrs. Lynch and Mrs. Archibald do not have the authority to hire employees or dismiss them. They have no authority to suspend employees, grant time off, reprimand, or grant wage increases. They do not interview applicants for employment when nurses' aides are hired and do not prepare evaluations on the nurses' aides. While Mrs. Lynch and Mrs. Archibald have a responsibility to see that work is carried out on their shifts, it is the registered nurses and Mrs. Harding who leave notes to the nurses' aides if one of their jobs is not done. Mrs. Lynch expressed the view that it is just an assumption that she is responsible for the nurses' aides.

7. Whenever a nurses' aid does not show up for work: Mrs. Lynch and Mrs. Archibald telephone to discover the reason for the non-attendance and, when necessary, arrange for a replacement from the list of nurses' aides who are not working. However, on occasions this procedure to find a substitute is performed by one of the nurses' aides who is at work.

On the afternoon shift three nurses' aides are employed and on the night shift only two nurses' aides are employed. Mrs. Lynch and Mrs. Archibald have some contact with the kitchen staff to the extent that they can inform them when a patient or resident is not receiving a proper diet. However, it is not their responsibility to reprimand the kitchen staff.

8. Mrs. Lynch gave evidence that she talks to any nurses' aide who is not performing her duties adequately and that if this is not effective she would mention the inadequacy to Mrs. Harding. However, neither Mrs. Lynch or Mrs. Archibald regards herself as a supervisor and, in fact, where one nurses' aide is not performing her work adequately or, to use the language of the Report, not carrying her weight, one of the nurses' aides may go directly to Mrs. Harding and complain about the default without reference to anyone else. Mrs. Lynch and Mrs. Archibald, on occasions, do initial an aide's time card where the time clock has not been punched. This appears to be done occasionally and is essentially a clerical function. Any decisions of a discretionary nature which arise from the hours of work recorded against an employee's name and the payment of wages clearly lies within the duties of Mrs. Harding.

9. Mrs. Lynch and Mrs. Archibald do not regard themselves as supervisors. The responsibility which they do exercise is essentially oriented towards the care of patients and residents. They do not supervise the work of the aides. The independent discretion which they do exercise is extremely limited and their relationship with the aides is comparable to the relationship between lead hands and production employees. The work on the respondent's premises is largely routine in nature and Mrs. Lynch and Mrs. Archibald do not even have the responsibility of assigning work to the aides.

10. The respondent referred to a concept of progressive discipline and the need to remove decision-makers from the bargaining unit. In our view, Mrs. Lynch and Mrs. Archibald are not decision-makers. The decision-maker appears to be Mrs. Harding. There also exists the possibility that the registered nurses are decision-makers. The Board finds that Mrs. Lynch and Mrs. Archibald do not exercise managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act and are therefore included in the bargaining unit.

11. The Board further finds that all employees of the respondent at St. Thomas who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 23, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

1059-78-R Eric Douglas McLarty and William Arthur Stewart,
(Applicants), – v – **Retail Clerks Union, Local 206**, (Respondent).

Termination – Board declining to exercise its discretion under section 51 where trade union has not slept on its bargaining rights

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Charles F. Clark, Douglas McLarty and William Stewart for the applicants; Alick Ryder and Charles McCormick for the respondent.*

DECISION OF THE BOARD; December 13, 1978

1. The applicants have applied to the Board under section 51(2) of The Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. Gordons Markets a Division of Zehrmart Limited (“Gordons”) is the employer of the employees who are affected by this application. The respondent was party to a collective agreement with Loblaws Limited which was by its terms effective from June 1, 1976, until May 31, 1978.

3. On March 15, 1978, the respondent applied under section 55 of the Act and requested the Board to make a declaration that a sale of a business within the meaning of section 55 had taken place between Loblaws Limited as vendor and Gordons as purchaser with respect to the premises known for municipal purposes as 3220 Dougall Avenue in the City of Windsor. In a decision dated July 10, 1978, the Board determined that there had been a sale within the meaning of section 55 of the Act and that the bargaining rights of the respondent were preserved. The Board declared that Gordons was bound by the collective agreement which was in effect and was subject to the rights and duties that flowed therefrom. See the *Gordons Markets a Division of Zehrmart Limited* case, [1978] OLRB Rep. July 630.

4. In a registered letter dated July 17, 1978, the respondent gave notice to Gordons of its desire to open negotiations for the purpose of modifying the existing collective agreement between Gordons and the respondent and requested that a meeting be set up at Gordons earliest convenience. In a letter dated July 18, 1978, the solicitors for Gordons notified the solicitors for the respondent that Gordons intended to apply for judicial review of the Board’s decision dated July 10, 1978. The solicitors for Gordons acknowledged the receipt of the notice to bargain and the grievances filed by the respondent and stated that Gordons intended to respond to those matters following the final determination of the application for judicial review by the Courts. On July 14, 1978, the respondent had filed four policy grievances with Gordons. In a letter dated July 28, 1978, the respondent informed Gordons that it wished to proceed to step III meeting pursuant to the collective agreement and asked for the earliest dates Gordons could meet to resolve the grievances. In a letter to Gordons dated August 9, 1978, the respondent enclosed a copy of its contract proposals and requested that Gordons advise in writing of tentative dates so that negotiations might commence.

5. In a letter to the respondent dated August 9, 1978, Gordons advised that it was proceeding for a judicial review of the Board's decision dated July 10, 1978, and stated that it did not admit being bound by the collective agreement. In a further letter to the respondent dated August 18, 1978, Gordons again referred to the pending judicial review and requested that the matter of tentative dates for negotiations be set aside until the judicial review is settled. However, in a letter to the respondent dated August 25, 1978, Gordons advised the respondent of the name of its nominee for the four policy grievances. In a letter to Gordons' nominee dated September 1, 1978, the respondent suggested the names of a chairman and in reply Gordons' nominee in a letter dated September 15, 1978 suggested other names for the position of chairman. This application was filed on September 18, 1978, and was heard on October 10, 1978. In a decision dated November 21, 1978, the Divisional Court dismissed Gordons' application for judicial review.

6. It was argued by the respondent that the Board did not have jurisdiction to entertain this application because the collective agreement had renewed itself because notice to bargain had not been given in time. In the alternative, the respondent argued that the Board should exercise its discretion and dismiss this application. The applicant argued that the Board had jurisdiction to entertain this application. In the light of the ultimate result of this application, the Board will assume, without deciding, that it has jurisdiction to entertain this application under section 51(2).

7. The applicant argued that the respondent had permitted a period of sixty days to elapse during which it has not sought to bargain. The respondent argued that it had actively pursued its role as a bargaining agent and referred to the facts set forth in paragraphs four and five.

8. The discretion of the Board under section 51 of the Act was stated in the *Dominion Stores Limited* case, 56 CLLC ¶18,047, at pages 1604-5 as follows:

The purpose of section 43 [now section 51] of the Act is to protect the employees, and in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interest of those employees. However, the section is to be used as a shield, not as a sword. Section 43 [now section 51] should not be used to penalize a union which has failed to give notice under section 10 [now section 13] of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the bargaining rights of the union instantaneously.

9. In exercising its discretion the Board looks at the whole period between the date of giving notice and the date of this application and endeavours to ascertain whether the respondent has actively pursued the interests of the bargaining unit. In this regard see *The Oliver Lumber Company of Toronto Limited* case, [1963] OLRB Rep. August 280 at page 284. In the *Muskoka Ambulance Service* case, [1974] OLRB Rep. September 590, the Board held that telegrams for the purpose of arranging a meeting satisfied the requirement of seeking to

bargain and in the *York Central Hospital* case, [1965] OLRB Rep. June 185, the Board viewed the presentation of a draft collective agreement as an attempt to bargain. In the *General Motors Products of Canada, Limited* case, [1968] OLRB Rep. March 1191, the Board held that the mailing of a letter requesting a meeting constituted an attempt to bargain even though the letter was not received by the employer until after the application was brought.

10. In the *Control Cast Co. Ltd.* case, Board File No. 1161-78-R, decision dated December 4, 1978, the Board held that the delivery of a proposed collective agreement and the attempts to arrange meetings are all attempts to bargain as contemplated by section 51(2) of the Act. The respondent has vigorously pursued its role as a bargaining agent in that one week after the Board's decision with respect to the application of section 55 it gave notice of its desire to open negotiations. Only four days after that decision the respondent filed four policy grievances. For the most part, Gordons' response was to raise the pending judicial review. While the respondent might well have endeavoured to press Gordons to meet and bargain, its conduct in the circumstances is understandable. It appears unlikely that any meaningful negotiations could have occurred between Gordons and the respondent as long as the application for judicial review was outstanding. Nevertheless, on August 9, 1978, the respondent forwarded a copy of its contract proposals and requested tentative dates for meetings. That date is clearly less than sixty days prior to the date of the filing of this application.

11. The Board finds that at no time did the respondent permit a period of sixty days to elapse during which it has not sought to bargain with Gordons. Moreover, the respondent has given, in the circumstances, a satisfactory explanation for its conduct since July 10, 1978.

12. Having regard to the foregoing and in the exercise of its discretion, the Board dismisses this application.

1122-78-R Christian Labour Association of Canada, (Applicant), – v –
Salvation Army Grace Hospital, (Respondent), – v – Canadian Union of
 Operating Engineers and General Workers, (Intervener).

– Termination – Timeliness – Termination application held to be untimely if made during compulsory interest arbitration process but prior to issuance of interest arbitrator's award.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *L. John Vanderlaan and John Kamphof for the applicant; W. L. McGregor and L. Dunkley for the respondent; Larry Haiven for the intervener.*

DECISION OF THE BOARD: *December 12, 1978*

1. This is an application for certification in which a pre-hearing representation vote was taken among the employees in the proposed bargaining unit. The bargaining unit is

comprised of engineers, mechanics, electronic technicians, their apprentices and helpers, employed by the Salvation Army Grace Hospital in Windsor. The labour relations of the employees in question are therefore regulated, in part, by the terms of The Hospital Labour Disputes Arbitration Act, R.S.O. 1970 c. 208, as amended.

2. The respondent and intervener submit that the application is untimely. Following the taking of the representation vote the Board held a hearing to entertain the representation of the parties on that issue.

3. The facts are not in dispute. This application was filed on September 16, 1978. By virtue of the award of a Board of Arbitration dated October 24, 1978, the intervener and respondent are privy to collective agreement which expires on December 31, 1978. The arbitration process was invoked under section 4 of The Hospital Labour Disputes Arbitration Act after the Minister of Labour advised the parties, by letter of the Deputy Minister dated March 7, 1978, that the Conciliation Officer had been unable to effect a collective agreement.

4. Section 9(2) of The Hospital Disputes Arbitration Act sets the time period during which bargaining rights may be displaced. It provides as follows:

9(2) Notwithstanding section 53 of *The Labour Relations Act*, where notice has been given under section 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of employees of a hospital to or by the employer of such employees and the Minister has appointed a conciliation officer, an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement or an application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit defined in the agreement shall not be made after the day upon which the agreement ceased to operate or the day upon which the Minister appointed a conciliation officer, whichever is later, except in accordance with section 5 or subsection 2 of section 49 of *The Labour Relations Act*, as the case may be.

5. In this case the appointment of the Conciliation Officer was made in October of 1977 and came after the collective agreement which was being renegotiated had ceased to operate. Thereafter, by the operation of section 9(2) of the Act, any application for certification of the employees concerned would be untimely. The effect of the legislation is obvious. It allows the parties the opportunity, after the expiry of their collective agreement, to pursue and exhaust the accommodative processes of conciliation and arbitration without the threat of disturbance of the union's bargaining rights. It would be inconsistent with the scheme of The Hospital Disputes Arbitration Act and with generally accepted principles of sound collective bargaining if the parties to final and binding interest arbitration should be liable to have bargaining rights extinguished by an application for certification initiated during the course of those proceedings which, if it were successful, would render the arbitration meaningless.

6. As the Board noted in *Hillsdale Nursing Home* [1978] OLRB Rep. Jan. 11, a

timely application could be made in the last two months of the collective agreement, in this case being November and December of 1978. It could also be made thereafter until a Conciliation Officer was appointed to assist the parties in the renewal of that agreement. For the above reasons the Board finds that at the time it was filed this application was untimely and must, therefore, be dismissed.

1161-78-R Mr. R. Scott Shute, (Applicant), – v – International Molders & Allied Workers Union, (Respondent).

– Termination – Board declining to exercise its discretion under section 51 where it was not satisfied that the union had slept on its bargaining rights.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and B. Lee.

APPEARANCES: *K. S. Shute for the applicant; Edward C. Whitthames and Frank Luce for the respondent.*

DECISION OF THE BOARD; December 4, 1978

1. The applicant has applied to the Board under section 51 of The Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. At the hearing the applicant stated that it was proceeding under section 51(2). This application was filed on October 10, 1978.
2. On May 12, 1978, the Board issued a certificate to the respondent with respect to a bargaining unit defined as all employees of Control Cast Co. Ltd. at London save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period. In a letter dated May 15, 1978, the respondent gave Control Cast Company Limited (the "company") written notice of its desire to bargain with a view to making a collective agreement pursuant to section 13 of the Act. On June 8, 1978, a proposed collective agreement was delivered to the company by the respondent. A meeting between the respondent and the company was arranged for June 20, 1978. Shortly before the meeting was to be held, the respondent informed the company that it was postponing the meeting because it was unable to secure the attendance of certain employees in conjunction with the meeting. On August 24, 1978, the respondent telephoned the company and arranged a meeting for September 8, 1978. Subsequently the respondent again felt compelled to postpone the meeting.
3. The applicant argued that the respondent had allowed a period of sixty days to elapse during which it has not sought to bargain. The respondent argued that it has given notice to the company, had attempted to bargain on June 20th and had set up a further meeting on September 8th. The respondent further argued that the period from September 8th to October 10th was not in excess of sixty days.
4. The discretion of the Board under section 51 of the Act was stated in the *Dominion Stores Limited* case, 56 CLLC ¶18,047, at pages 1604-5 as follows:

The purpose of section 43 [now section 51] of the Act is to protect the employees, and in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. However, the section is to be used as a shield, not as a sword. Section 43 [now section 51] should not be used to penalize a union which has failed to give notice under section 10 [now section 13] of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the bargaining rights of the union instantaneously.

5. In exercising its discretion the Board looks at the whole period between the date of giving notice and the date of this application and endeavours to ascertain whether the respondent has actively pursued the interest of the bargaining unit. In this regard see *The Oliver Lumber Company of Toronto Limited* case, [1963] OLRB Rep. August 280 at page 284. In the *Muskoka Ambulance Service* case, [1974] OLRB Rep. September 590, the Board held that telegrams for the purpose of arranging a meeting satisfied the requirement of seeking to bargain and in the *York Central Hospital* case, [1965] OLRB Rep. June 185, the Board viewed the presentation of a draft collective agreement as an attempt to bargain. In the *General Motors Products of Canada, Limited* case, [1968] OLRB Rep. March 1191, the Board held that the mailing of a letter requesting a meeting constituted an attempt to bargain even though the letter was not received by the employer until after the application was brought.

6. In our view, the delivery of the proposed collective agreement on June 8th, the arrangement for meetings on June 20th and September 8th are all attempts to bargain. The respondent has given an explanation for its conduct. On reviewing the evidence before it and having regard to the representations of the parties, the Board is satisfied that the respondent has taken *bona fide* steps to initiate negotiations with the company and must be said to have sought to bargain within the meaning of section 51(2) of the Act.

7. Having regard to the foregoing and in the exercise of its discretion the Board dismisses this application.

1436-78-R Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant), – v – The Corporation of the City of Toronto, (Respondent), – v – Toronto Civic Employees Union, Local 43, C.U.P.E., (Intervener).

– Certification – Construction Industry – Board found that respondent was engaged in the

construction industry for certain work even though principal activities did not involve construction work.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *Harold F. Caley and Joe Campbell for the applicant; H. D. Cameron and E. DuVernet for the respondent; C. M. Mitchell and J. Thomerson for the intervener.*

DECISION OF THE BOARD: December 21, 1978

1. The applicant has applied for certification and seeks to represent its normal craft unit of carpenters and carpenters' apprentices in the employ of the respondent in the Board's geographic area no. 8, save and except non-working foremen and persons above the rank of non-working foreman.
2. The respondent adopted the position that it is not an employer in the construction industry and any certificate which issues should not be in respect of the construction industry.
3. The intervener filed a collective agreement and made representations in its reply that the respondent was not an employer within the meaning of section 106 of The Labour Relations Act and asserted that it had bargaining rights for carpenters.
4. Initially the Board required the intervener to establish its status to intervene in this proceeding. The intervener did not claim to represent any of the persons affected by this application and agreed with the respondent that its collective agreement by reason of Article III did not cover the persons who are affected by this application for certification.
5. The intervener was required to establish its entitlement to participate in this proceeding by establishing its status to appear before the Board. The Board gave the parties an opportunity to call evidence on this matter. The intervener, however, for internal reasons was not prepared to give evidence at the hearing and requested an adjournment. This request for an adjournment was opposed by the applicant and the Board ruled that unless the parties gave unanimous consent to an adjournment the Board would not grant the adjournment and would proceed to hear this application. The intervener sought to file a job description for handyman, which is one of the categories covered by its collective agreement with the respondent. The Board rules that this was not relevant since it was with respect to a category under the collective agreement which did not by its terms affect the employees affected by this application. The Board dismissed the intervention on the grounds that the intervener had failed to establish that it had an interest to intervene in this proceeding.
6. The Board then proceeded with the hearing and entertained the representations of the applicant on the respondent on all outstanding issues between them, namely, the appropriate bargaining unit, whether the persons who are alleged to be affected by this application are employees within the meaning of section 106(b) of the Act, whether the respondent is an employer within the meaning of section 106(c) of the Act and the nature of the work performed by such persons.
7. The Board finds that Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227

and 3233 of the United Brotherhood of Carpenters and Joiners of America are trade unions within the meaning of section 1(1)(n) of The Labour Relations Act. The Board further finds that they are constituent trade unions of the applicant.

8. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of The Labour Relations Act.

9. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent, within the meaning of section 9(1) of The Labour Relations Act.

10. The applicant and the respondent agreed that the carpenters who are affected by this application have been supplied from the applicant's hiring hall and that they were temporary employees who were supplied at the request of the respondent. It was further agreed that while these carpenters are paid according to the terms of a collective agreement which is province-wide in operation and applies to the industrial, commercial and institutional sector of the construction industry, they are not at the present time covered by such a collective agreement.

11. The applicant and the respondent agreed that the persons who are affected by this application work on the respondent's property and do basically repairing, restoration and remodelling. Examples of their work include layout work, the removal and installation of demountable partitions, hanging doors, attaching hardware, cutting dutch doors, building forms, repairs to ice rink boarding, building picnic tables, the installation of picket fences, the building and installation of counters, boarding up of sheds and windows, demolition and construction of walls, the installation of drywall, the laying of floor tiles, repairs to furniture and park benches and repairs to city housing.

12. The applicant referred to section 106(b) of the Act and pointed out that since 1970 the definition of employee included employees engaged in whole or in part in off-site work but who are commonly associated in their work or bargaining with on-site employees. It was argued that the employees who are affected by this application are either engaged entirely in on-site work or are engaged in part in on-site and in part in off-site work. The applicant reasoned that the employees affected by this application are employees within the meaning of section 106(b) of the Act. The applicant referred to the definition of construction industry in section 1(1)(f) of the Act and analyzed the various jobs which have been referred to in the preceding paragraph. Reference was made to some of the leading cases in this area. The applicant referred to the *Tops Marina Motor Hotel* case, 64(3) CLLS ¶16,004; the *Kapuskasing Board of Education* case, 72 CLLC ¶16,057; and to the *M. G. Burke Investments Limited* case, Board file No. 0640-76-R, unreported decision dated February 28, 1977.

13. The respondent argued that it is not an employer as defined in section 106(c) of the Act in that it is not operating a business in the construction industry. The respondent pointed out that the general nature of its business is municipal government. The respondent made reference to a decision of this Board in an accreditation application wherein the Board apparently made a finding that the City of Toronto was not covered by that application. However, no reasons were given for this finding and it is difficult to determine why reference was made to the respondent in that case because it is agreed by the applicant and the respondent (the applicant having been also involved in that application for accreditation)

that the applicant did not have bargaining rights with respect to the employees of the respondent who were affected by the application for accreditation either at the present time or at the time of the making of the application for accreditation. Such a statement is not binding on this panel. At their very highest such statements are *obiter dicta*. Finally, the respondent pointed out that it derived no profit or gain from the activities of the persons who are affected by this application.

14. There is no doubt that the employees who are affected by this application are engaged either entirely on on-site work or are engaged in whole or in part in offsite work. There is also no doubt that the employees who are affected by this application are commonly associated in bargaining with on-site employees within the meaning of section 106(b) of the Act. Some of the work performed by these employees was clearly taking place at site of the construction activity. The Board now considers whether the respondent is an employer within the meaning of section 106(c) of the Act. Under this subsection the employer is defined for the purpose of this application as meaning a person who operates a business in the construction industry.

15. The Board has on many occasions considered situations where employers whose principal or common business is not in the construction industry have been affected by an application for certification under the construction industry provisions of the Act but who have clearly entered the field and performed work which would be commonly regarded as construction work. In the *Tops Marina Motor Hotel* case, *supra*, the Board held that it was not necessary for the construction activity to be the only business activity or the primary business activity of an employer in order for such an employer to operate a business in the construction industry. Similarly, in the *Kapuskasing Board of Education* case, *supra*, the Board held that while the principal business of an employer may not be in the construction industry, such an employer may also operate a business in the construction industry, either on a temporary basis or for some period of time, even though the employer does not anticipate it will regularly carry on a business in the construction industry in the future or even carry on one more operation in the construction industry. In these circumstances the Board has held that this was not a reason not to hold that such an employer is carrying on a business in the construction industry. The Board also noted in that case that there is no requirement that in order to operate a business an operator of such business must necessarily carry on such venture with a view to making a profit. In our view, the respondent is an employer within the meaning of section 106(c) of The Labour Relations Act because it performs from time to time work which falls within the definition of construction industry in section 1(1)(f) of the Act.

16. Much of the activity performed by the employees affected by this application clearly falls within the work included in the definition of construction industry in section 1(1)(f) of the Act. However, there is no doubt that certain of their work is clearly not in the construction industry. For example, the repairs to furniture and park benches and the building of picnic tables, does not fall within the definition of construction industry in section 1(1)(f). In the *M. G. Burke Investments Limited* case, *supra*, the Board considered the nature of the work performed by certain employees whose work was partially within the construction industry and partially outside the construction industry. The Board considered whether certain work was related to chattels or fixtures and for the guidance of the parties in that case the Board set forth two general considerations concerning whether certain objects become fixtures or remain chattels. Where an article is affixed to the land, even slightly, such

article is to be considered as part of the land. Where an article is affixed to the land, even slightly, such article is to be considered as part of the land and work in connection with such an article would fall within the definition of construction industry. Work on chattels, of course, is not work which falls within the construction industry.

17. Having regard to the foregoing, the Board finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.

18. The Board has considered the representations of the parties with respect to the appropriate bargaining unit. There is no doubt that the work performed by the employees affected by this application is, in part, work which is covered by the definition of construction industry in section 1(1)(f) and is, in part, work on chattels. It is not the intention of the Board, having regard to the fact that this application for certification was made under the construction industry provisions of the Act, to determine a bargaining unit whereby the employees in that bargaining unit are arguably given the work jurisdiction to do repairs to chattels. Having regard to the nature of the work which the employees perform, the Board is of the view that the appropriate bargaining unit ought to be restricted to construction work. The Board further finds that all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged on construction projects, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

19. For the purpose of clarity, the Board declares that persons who are engaged in maintenance are not included in the bargaining unit.

20. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 9(3) of The Labour Relations Act, are deemed to be members of the applicant on December 1, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1978

BARGAINING AGENTS CERTIFIED DURING NOVEMBER

No Vote Conducted

0998-77-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Giordano Sand & Gravel Limited (Respondent).

Unit: "all dependent contractors working at or out of the respondent's location at Brock Road, Claremont, save and except dispatchers and persons above the rank of dispatcher." (6 employees in the unit).

0039-78-R: Canadian Union of Public Employees (Applicant) v. Metropolitan Toronto Association for the Mentally Retarded (Respondent).

Unit #1: "all employees employed by the respondent in the municipality of Metropolitan Toronto employed in its adult residence service, save and except supervisors, persons above the rank of supervisor, office and clerical staff, house-keeping, domestic and maintenance employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (64 employees in the unit).

Unit #2: "all employees employed by the respondent in the Municipality of Metropolitan Toronto regularly employed in its adult residence services for not more than twenty-four hours per week and students employed during the school vacation period, save and except office and clerical staff, house-keeping, domestic and maintenance employees." (44 employees in the unit).

0463-78-R: Laborers International Union of North America, Local 607 (Applicant) v. PLS Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0514-78-R: Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Zimcor Company (Respondent) v. Local - 47 Sheet Metal Workers' International Association (Intervener #1) v. Ontario Council of Painters (Local Union 1819 & Local Union 200) (Intervener #2).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

0515-78-R: Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Active Sign Erection (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0552-78-R: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent).

Unit: "all meat department employees of the respondent in its stores in the municipality of Niagara Falls, save and except meat managers, persons above the rank of meat manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (4 employees in the unit). (*Having regard to the foregoing*).

0745-78-R: International Brotherhood of Electrical Workers – Local 586 – Ottawa (Applicant) v. Lyle West Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit). (*Having regard to the foregoing*).

0753-78-R: Hotel and Restaurant Employees and Bartenders' International Union, Restaurant, Cafeteria and Tavern Employees Union, Local 254 (Applicant) v. Orangerooft Canada Ltd., Operating as Howard Johnson's Restaurant (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at the Howard Johnson's Restaurant located at 291 Yonge Street, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period." (29 employees in the unit). (*Having regard to this agreement*).

0864-78-R: Labourer's International Union of North America, Local 183 (Applicant) v. Grove Drain Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0909-78-R: Ontario Nurses' Association (Applicant) v. St. Jacques Nursing Home (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at the St. Jacques Nursing Home, Embrun, save and except the Director of Nursing and persons above the rank of Director of Nursing." (4 employees in the unit).

1026-78-R: Retail Clerks Union Local 206 Chartered by the Retail Clerks International Union (Applicant) v. Coles Book Stores Limited (Respondent).

Unit #1: “all employees of the respondent in London, save and except store managers, persons above the rank of store manager and persons regularly employed for not more than twenty-four hours per week.” (6 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #2: “all employees of the respondent in London who are regularly employed for not more than twenty-four hours per week, save and except store managers and persons above the rank of store manager.” (8 employees in the unit). (*Having regard to the agreement of the parties*). (*Certificate*).

1159-78-R: The International Brotherhood of Painters and Allied Trades Local 1824 (Applicant) v. Caledonia Painting and Decorating (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1164-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Cuddy Food Products Limited (Respondent).

Unit: “all employees of the respondent in the City of London save and except retail employees, foremen, foreladies, persons above the rank of foreman or forelady, office and sales staff, students employed in school vacation period, and persons regularly employed for not more than 24 hours per week.” (68 employees in the unit). (*Having regard to the agreement of the parties*).

1180-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Curran Contractors Ltd. (Respondent).

Unit: “all employees of the respondent in the Counties of Essex and Kent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

1187-78-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. General Alarms Ltd. (Respondent).

Unit: “all employees of the respondent, save and except foremen, persons above the rank of foreman and office staff.” (7 employees in the unit).

1190-78-R: The London Ambulance Attendants’ Association (Applicant) v. Thames Valley Ambulance Limited (Respondent).

Unit: “all employees of the respondent who are regularly employed for not more than twenty-four hours per week, save and except supervisors, persons above the rank of supervisor and office staff.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1196-78-R: Christian Labour Association of Canada (Applicant) v. Norman A. Faucher Ltd. (Respondent).

Unit: “all employees of the respondent employed in the town of Amherstburg, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week.” (45 employees in the unit). (*Having regard to the agreement of the parties*).

1198-78-R: Service Employees International Union, Local 183 AF of L., C.I.O., C.L.C. (Applicant) v. Prince Edward County Memorial Hospital (Respondent).

Unit: "all employees of the respondent in Picton, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate dietitians, student dietitians, graduate pharmacists, undergraduate pharmacists, technical personnel, supervisors, foremen, persons above the rank of supervisor or foremen, chief engineer, office and clerical personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in the unit).

1205-78-R: Canadian Paperworkers Union (Applicant) v. Reed Decorative Products Ltd. (Respondent).

Unit: "all employees of the respondent at its secondary warehouse in Brampton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by a subsisting collective agreement between the respondent and the applicant and its Local 304." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1212-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. The Bauer Bros. Co. (Canada) Ltd. (Respondent).

Unit: "all employees of the respondent at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, sales staff, servicemen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (67 employees in the unit). (*Having regard to the agreement of the parties*).

1216-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Gunter Shoes Limited (Respondent).

Unit: "all production employees of the respondent on Lorraine Road and Prosperity Street in the Municipality of Port Colborne, the Homeworkers employed by the respondent in the City of Port Colborne, and the delivery man, save and except Foremen and Foreladies, those above the rank of Foreman and Forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours a week and students employed during the school vacation period." (51 employees in the unit). (*Having regard to the agreement of the parties*).

1218-78-R: Wood, Wire and Metal Lathers International Union, Local 562 (Applicant) v. Parkdale Drywall and Construction Inc. (Respondent).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1220-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dajoroma Concrete Forming Company (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1234-78-R: Labourer's International Union of North America, Local 1059 (Applicant) v. Consortium Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1246-78-R: Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Isabelle Brothers Limited (Respondent).

Unit: "all employees of the respondent at and out of its sawmill and planing mill operations at Opa-satika, McCrea Township, District of Cochrane, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (32 employees in the unit). (*Having regard for the agreement of the parties*).

1258-78-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Armbro Ready-Mix, a division of Armbro Materials & Construction Ltd. (Respondent).

Unit: "all batchers working for the respondent at Brampton and at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff and those persons covered by an existing collective agreement." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1259-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. C-T-G General & Management Contractors Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1260-78-R: Christian Trade Unions of Canada (Local 6) (Applicant) v. Per-fec-tion Insulations Ltd. (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverley Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1261-78-R: International Association of Bridge, Structural & Ornamental Ironworkers Local 765 (Applicant) v. Berwil Ltd. – Ltee (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1262-78-R: International Association of Bridge, Structural & Ornamental Iron Workers Local 765 (Applicant) v. Richard's Steel Re-Enforcement Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Regional

Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1264-78-R: United Steelworkers of America (Applicant) v. Northern and Central Gas Corporation Limited (Respondent).

Unit: "all office and clerical employees of the respondent in Sudbury, save and except supervisors, persons above the rank of supervisor, confidential clerk to the regional manager, students employed during the school vacation period and persons covered by a subsisting collective agreement." (7 employees in the unit).

1271-78-R: Retail Clerks Union, Local 486, Chartered by the Retail Clerks International Union (Applicant) v. Canteen of Canada Limited (Ontario)(Respondent).

Unit: "all employees of the respondent employed at and out of the Regional Municipality of Ottawa-Carlton, save and except supervisors, persons above the rank of supervisor, office staff and persons regularly employed for not more than 24 hours per week." (20 employees in the unit).

1272-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant). v. Burlington Die Castings Company Limited (Respondent).

Unit: "all employees of the respondent in the City of Burlington, save and except foremen, persons above the rank of foreman, management trainees, office and sales staff, security guards, persons regularly employed for not more than 24 hours per week and students, employed during the school vacation period." (157 employees in the unit). (*Having regard to the agreement of the parties*).

1273-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. D.M.D. Triangle Lathing & Acoustics Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

1290-78-R: Ontario Nurses' Association (Applicant) v. Lyndhurst Hospital (Respondent).

Unit: "all registered and graduate nurses employed by the respondent at its hospital in Metropolitan Toronto engaged in a nursing capacity save and except head nurses, persons regularly employed for more than twenty-four (24) hours per week and employees covered by a subsisting collective agreement with the Service Employees Union." (12 employees in the unit). (*Having regard to the agreement of the parties*).

1295-78-R: International Union of Operating Engineers, Local 772 (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Mary's Hospital, London, Ontario (Respondent).

Unit: "all Stationary Engineers and helpers employed by the respondent in London, Ontario, except Chief Stationary Engineer and Stationary Engineers regularly employed for not more than twenty-four hours per week." (5 employees in the unit).

1298-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Goldie-Burgess Limited Construction Managers (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1303-78-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Niagara (Respondent).

Unit: "all employees of the respondent engaged in the Senior Citizens Assistance Program, save and except Supervisors and those above the rank of Supervisor." (26 employees in the unit).

1305-78-R: Retail Clerks Union, Local 409 (Applicant) v. Biltrite Lumber and Supply Limited (Respondent).

Unit: "all employees of the respondent at its retail store in County Fair Plaza, Thunder Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except office staff and persons covered by a subsisting collective agreement between Lumber & Sawmill Workers Union Local 2693 and Biltrite Lumber and Supply Limited." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1313-78-R: Ontario Public Service Employees Union (Applicant) v. Oaklands Regional Centre (Respondent).

Unit: "all employees of the respondent in Oakville, save and except Supervisors and persons above such rank; Secretary to the Executive Administrator; Secretaries to the Personnel Supervisor; students employed during the school vacation period; persons regularly employed for not more than twenty-four hours per week, pool staff and persons covered by subsisting Certificates being all registered and graduate nurses." (157 employees in the unit).

1321-78-R: Service Employees Union, Local 204 Affiliated with A.F. of L.C.I.O., C.L.C. (Applicant) v. St. Raphael's Nursing Home Ltd. carrying on business under the firm name and style of St. Raphael's Nursing Home (Yorkville) (Respondent).

Unit #1: "all employees of St. Raphael's Nursing Home (Yorkville) in Metropolitan Toronto, save and except professional medical staff, registered nurses, graduate nurses, and undergraduate nurses, physiotherapists, occupational therapists, Director of Activities, and office staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

Unit #2: "all employees of St. Raphael's Nursing Home (Yorkville) in Metropolitan Toronto who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered nurses, graduate nurses, and undergraduate nurses, physiotherapists, occupational therapists, Director of Activities, office staff, supervisors and persons above the rank of supervisor." (36 employees in the unit).

1329-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Three Colours Construction Co. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontar-

io, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1334-78-R: Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 3227, 1747, 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Toronto College Street Centre Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1338-78-R: Labourers’ International Union of North America, Local 506 (Applicant) v. P.P.F. Formwork Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in the unit).

1342-78-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Brown & Huston Limited Contractors (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1372-78-R: Christian Labour Association of Canada (Applicant) v. Neath & Associates Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

Applications Certified Subsequent to Pre-Hearing Vote

1113-78-R: The Independent Gas Workers Union (Applicant) v. Ottawa Gas (Respondent) v. International Chemical Workers Union and its Local 672 (Intervener).

Unit: “all employees of Ottawa Gas save and except Executives, Superintendents, Supervisors, General Foremen, Foremen, Secretaries to the Superintendents, those Secretaries above the rank of Secretary to Superintendent, sales staff and Chief Clerk.” (107 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. November 1978).

Number of names of persons on revised voters' list		99
Number of persons who cast ballots		90
Number of ballots marked in favour of applicant	88	
Number of ballots marked in favour of intervener	2	

1152-78-R: International Woodworkers of America (Applicant) v. Sklar Furniture Ltd., Peppler Division (Respondent).

Unit: "all office, Clerical and Technical employees of the Respondent at Hanover, Ontario, save and except supervisors, persons above the rank of supervisor, Outside Salesmen, Security Guards, Industrial Engineering Personnel, Design and Sample Making Personnel, Personnel Administrator, Purchasing Agent, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by the subsisting collective agreement between the Respondent and International Woodworkers of America, Local 2-500." (16 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots		16
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	5	

Applications Certified Subsequent to Post-Hearing Vote

1409-77-R: International Ladies' Garment Workers' Union (Applicant) v. New-Port Sportswear Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman and forelady, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (72 employees in the unit).

Number of names of persons on revised voters' list		112
Number of persons who cast ballots		98
Ballots segregated and not counted	1	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	48	
Number of ballots marked against applicant	46	

1125-78-R: Graduate Assistants Association (Applicant) v. Board of Governors of Lakehead University (Respondent).

Unit: "all persons registered at Lakehead University at Thunder Bay as Graduate or Undergraduate students and who are regularly employed on a part-time basis in teaching, demonstrating, tutoring or marking or as Research Assistants, save and except Lecturers, persons above the rank of Lecturer, persons whose salaries are paid from other than operating funds, persons in other bargaining units of the University, and all other persons employed in a full-time capacity at Lakehead University." (79 employees in the unit). (*clarity note* - see Report of full decision (1978) OLRB Rep. November 1978).

Number of names of persons on list as originally prepared by employer		87
Number of persons who cast ballots		58
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	41	
Number of ballots marked against applicant	16	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0334-78-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Canada Dry Bottling Company (Kingston) Ltd. (Respondent) v. Group of Employees (Objectors). (19 employees).

0645-78-R: International Beverage Dispensers and Bartenders Union, Local 280 of the Hotel & Restaurant Employees and Bartenders International Union (Applicant) v. The Organ Grinder Ltd. (Respondent) v. Employees (Objectors). and

0647-78-R: International Beverage Dispensers and Bartenders Union, Local 280 of the Hotel & Restaurant Employees and Bartenders International Union (Applicant) v. The Organ Grinder Ltd. (Respondent) v. Employees (Objectors). (99 employees).

0696-78-R: IBEW Construction Council of Ontario (Applicant) v. Courtland Electric Ltd. (Respondent). (7 employees).

1066-78-R: United Steelworkers of America (Applicant) v. Jet Metal Products Ltd. Jetco Manufacturing Limited (Respondent). (43 employees).

1195-78-R: Retail Clerks International Union (Applicant) v. Maclean-Hunter Cable TV Limited (Respondent).

Unit: "all employees of the Respondent employed at and out of the city of Guelph, Ontario, save and except technical supervisor, sales staff and persons employed in the production studio of the employer." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1217-78-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Extendicare Ltd. (Respondent). (41 employees).

1233-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jane & Finch Hirise Holding Limited and/or Escort Real Estate Ltd. (Respondent). (2 employees).

1263-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Marathon (Respondent) v. Group of Employees (Objectors). (42 employees).

1275-78-R: Canadian Union of Public Employees (Applicant) v. Protestant Children's Village Incorporated (Respondent). (126 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0198-78-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Curran & Herridge Construction Co. Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 915 (Intervener).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the County of Lambton." (6 employees).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener	6	

Certification Dismissed Subsequent to Post-Hearing Vote

0612-78-R: International Union of Doll & Toy Workers of the United States & Canada, Local 905 (Applicant) v. Daltons (1834) Limited & Daltons Customs Packaging (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant at 175 Commander Blvd., Agincourt (Scarborough), Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than twenty-four hours per week." (80 employees in the unit).

Number of names of persons on list as originally prepared by employer		40
Number of persons who cast ballots	39	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	31	

0765-78-R: United Steelworkers of America (Applicant) v. W. C. Pursley Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (87 employees in the unit).

Number of names of persons on revised voters' list		66
Number of persons who cast ballots	65	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	27	
Number of ballots marked against applicant	37	

0948-78-R: Retail Clerks Union, Local 1977, chartered by the Retail Clerks International Union (Applicant) v. Zehr's Markets, Division of Zehrmart Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Fergus, save and except store manager and persons above the rank of store manager." (50 in the unit).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots		36
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	32	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1110-78-R: Labourers' International Union of North America, Local Union No. 597 (Applicant) v. A & B Paving Co. Ltd. (Respondent). (5 employees).

1116-78-R: Central of Independent Unions of the Automobile Industry of Ontario (Applicant) v. Canpark Services Ltd. (Respondent). (10 employees).

1191-78-R: Labourers International Union of North America, Local 527 (Applicant) v. Acto Construction and Engineering Limited (Respondent). (5 employees).

1192-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Acto Builders (Eastern) Limited (Respondent). (5 employees).

1197-78-R: Labourers' International Union of North America, Local 749 (Applicant) v. The Corporation of the Town of Wallaceburg (Respondent). (29 employees).

1215-78-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Aiton Pipework & Process Plant Ltd. (Respondent). (3 employees).

1225-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. G. C. Romano and Sons (Toronto) Ltd. (Respondent). (2 employees).

1287-78-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Patrick Harrison & Co. Ltd. Harrison Rock and Tunnel Co. Ltd. Bradford -- Harrison & Associates Ltd. The Harrison Group (Respondents). (2 employees).

1288-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. George Wimpey Canada Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener). (3 employees).

1289-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Amor Forming Limited (Respondent). (12 employees).

1296-78-R: Employees' Association of Hiway Market (Applicant) v. Hiway Market Limited (Respondent). (120 employees).

1304-78-R: Retail Clerks Union, Local 206 chartered by the Retail Clerks International Union (Applicant) v. Tip-Top Tailors (Respondent). (55 employees).

1335-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Amor Forming Limited (Respondent). (2 employees).

1371-78-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States & Canada AFL-CIO-CLC. Kirkland Lake & Timmins Local #669 (Applicant) v. Timmins Theatres Limited & Famous Players Limited Palace & Victory Theatres. Timmins, Ontario (Respondent). (2 employees).

1389-78-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Scarborough Centenary Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener). (95 employees).

1451-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Elmford Construction Limited (Respondent). (2 employees).

APPLICATIONS UNDER SECTION 1(4)

0272-78-R: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC (Applicant) v. Dominion Stores Limited and Min-A-Mart Limited (Respondents). (2 employers). (*Dismissed*).

0273-78-R: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC (Applicant) v. 368970 Ontario Limited, carrying on business as Discount Food Warehouse (Respondents). (2 employers).

1077-78-R: Carpenters District Council of Toronto and Vicinity on behalf of its Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. George Ryder Construction Limited and Cavalier Construction Inc. (Respondents). (2 employers).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0562-78-R: Roy E. C. Baker (Applicant) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural & Ornamental Ironworkers (Respondent) v. Venture Metalcrafts Limited (Intervener). (*Granted*).

Unit: "all employees employed by Venture Metalcrafts Limited at its shop, or shops, in the Municipality of Metropolitan Toronto and City of Oshawa, Ontario, including those engaged in production and/or normal maintenance work, save and except foremen, persons above the rank of foreman, office and clerical staff, draftsmen, watchmen, guards persons engaged in major extensions or major remodelling of the company's premises, and persons engaged in field erection work." (15 employees in the unit).

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots marked in favour of Respondent	3
Number of ballots marked against Respondent	13

1108-78-R: Wayne O'Callaghan (Applicant) v. United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Respondent). (*Granted*).

Unit: "all employees of Viceroy Construction Company Limited employed at its plant in Metropolitan Toronto save and except foremen, persons above that rank, office and sales staff." (82 employees in the unit).

Number of names of persons on revised voters' list	80
Number of persons who cast ballots	78
Number of spoiled ballots	2
Number of ballots marked in favour of Respondent	20
Number of ballots marked against Respondent	56

1155-78-R: Leonard S. Martin (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Cadillac Fairview Corporation Limited (Intervener). (55 employees). (*Dismissed*).

1186-78-R: Employees of Rondar Services Ltd. (Applicant) v. IBEW Union Local 105 (Respondent). (3 employees). (*Granted*).

1199-78-R: Mary Lockwood (Applicant) v. The Hotel and Restaurant Employees Union Local 743 affiliated with the Hotel and Restaurant Employees and Bartenders International Union, W. & D.L.C. & C.L.C. (Respondent) v. Elmwood Motel (Intervener). (26 employees). (*Dismissed*).

1223-78-R: Robert Mach (Applicant) v. United Steeworkers of America (Respondent). (7 employees). (*Granted*).

1294-78-R: Alexander Vass (Applicant) v. United Steelworkers of America (Respondent) v. Vincent Steel & Service Limited (Intervener). (18 employees). (*Granted*).

1328-78-R: Carol Kerr (Applicant) v. Christian Labour Association of Canada (Respondent) v. Versa-Care Centres of Ontario Limited (Intervener). (81 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0957-78-U: Mechanical Contractors of Hamilton, Adam Clark Company Ltd., Jaddco Anderson Construction Limited and Comstock International Ltd. (Constructors Division) (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 67, Hugh Kerrigan, Trevor Byrne, Geoff Copoc, and Employees listed on Scheduled A, B, and C attached hereto (Respondents). (*Withdrawn*).

1244-78-U: Reid Dominion Packaging Limited (Applicant) v. Graphic Arts International Union, Local 542, Hamilton, Clarke Faulkener and T. Evans et al (Respondents). (*Withdrawn*).

1257-78-U: Consolidated Fastrate Limited (Applicant) v. Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Maynard Lewis, Mark Beaudoin, Ken Beaver et al (Respondents). (*Withdrawn*).

1307-78-U: Comstock International Limited (Applicant) v. Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent). (*Withdrawn*).

1333-78-U: Canada Forgings Ltd. (Applicant) v. D. Ball, et al (see attached Schedule "A") (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0632-78-U: Hotel, Motel and Restaurant Employees and Beverage Dispensers Union, Local No. 757 (Applicant) v. Societa Italiana Di Benevolenza Principe Di Piemonte (Respondent). (*Withdrawn*).

1085-78-U: International Woodworkers of America (Applicant) v. Livingston Industries Inc. John Wiggers and Tom Plant (Respondent). (*Withdrawn*).

1299-78-U: Retail Clerks International Association and Retail Clerks International Union Local 1979 (Applicants) v. Bata Industries Limited and Garret Debruyne (Respondents). (*Withdrawn*).

1308-78-U: Comstock International Limited (Applicant) v. Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent). (*Withdrawn*).

1309-78-U: Comstock International Limited (Applicant) v. G. J. Giroux et al (Respondents). (*Withdrawn*).

1354-78-U: Retail Clerks Union, Local 206 (Chartered by the Retail Clerks International Union) (Applicant) v. Tip-Top Tailors (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1710-77-U: The United Steelworkers of America (Complainant) v. Interroyal Corporation Ltd. (Respondent). (*Withdrawn*).

0161-78-U: Bricklayers, Masons Independent Union of Canada, Local 1 (Complainant) v. The Metropolitan Toronto Apartment Builders Association, Toronto Building and Construction Trades Council (Respondents). (*Dismissed*).

0316-78-U: Teamsters Local Union No. 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Crenmar Services Limited; Collard Brothers Cartage and Mobile Leasing (Respondents). (*Withdrawn*).

0631-78-U: Hotel, Motel and Restaurant Employees and Beverage Dispensers Union, Local No. 757 (Complainant) v. Societa Italiana Di Benevolenza Principe Di Pilemonte (Respondent). (*Withdrawn*).

0807-78-U: International Woodworkers of America (Complainant) v. Travel Mate Motor Homes Ltd. (Respondent). (*Withdrawn*).

0915-78-U: United Steelworkers of America (Complainant) v. Canadian Industries Limited Industrial Chemicals Division Copper Cliff works (Respondent). (*Dismissed*).

0940-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. Grove Drain Company Limited (Respondent). (*Dismissed*).

0941-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Complainant) v. Metal Improvement Company Inc. Mican Division (Respondent). (*Withdrawn*).

0942-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Complainant) v. Metal Improvement Company Inc. Mican Division (Respondent). (*Withdrawn*).

1004-78-U: George Kalozakis (Complainant) v. Local 195 – International Union, United Automobile Aerospace and Agricultural Implement Workers of America (Respondent) v. National Auto Radiator Manufacturing Company Limited (Intervener). (*Dismissed*).

1018-78-U: United Steelworkers of America (Complainant) v. Nordic Engine and Machine Ltd. (Respondent).

- and -

1146-78-U: United Steelworkers of America (Complainant) v. Nordic Engine and Machine Ltd. (Respondent). (*Dismissed*).

1083-78-U: Toronto Typographical Union No. 91 (I.T.U.) (Complainant) v. WEB Offset Publications Limited (Respondent). (*Granted*).

1084-78-U: International Woodworkers of America (Complainant) v. Livingston Industries Inc. (Respondent). (*Withdrawn*).

1115-78-U: Ilma Anyas-Weiss (Complainant) v. Joel J. Edelson and J.E.D. X-Ray Management Ltd. (Respondents). (*Withdrawn*).

1162-78-U: Canadian Food & Associated Services Union (Complainant) v. Federated Building Maintenance Services Co. Ltd. (Respondent). (*Terminated*).

1200-78-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Canadian Appliance Manufacturing Company Limited (Respondent). (*Withdrawn*).

1254-78-U: Steve Haras (Complainant) v. Canadian Food and Allied Workers (Respondent). (*Withdrawn*).

1281-78-U: Toronto Typographical Union No. 91 (I.T.U.) (Complainant) v. Swift-O-Type Limited (Respondent). (*Withdrawn*).

1291-78-U: International Brotherhood of Electrical Workers, Local 586 (Complainant) v. General Alarm Limited (A Subsidiary of General Group, Ottawa, Ontario) (Respondent). (*Withdrawn*).

1300-78-U: Retail Clerks International Association and Retail Clerks International Union Local 1979 (Complainants) v. Bata Industries Limited and Garret Debruyne (Respondents). (*Withdrawn*).

1306-78-U: Toronto Civic Employees Union, Local Union 43, Canadian Union of Public Employees (Complainant) v. Municipality of Metropolitan Toronto (Respondent). (*Withdrawn*).

1315-78-U: Canadian Union of Public Employees (Complainant) v. St. Joseph's Hospital – Toronto (Respondent). (*Withdrawn*).

1316-78-U: Canadian Union of Public Employees (Complainant) v. Good Samaritan Nursing Home (Respondent). (*Withdrawn*).

1326-78-U: Metropolitan Toronto Civic Employees, Local 43, Canadian Union of Public Employees (Complainant) v. Municipality of Metropolitan Toronto (Respondent). (*Withdrawn*).

1343-78-U: Ontario Nurses' Association (Complainant) v. Wellington-Dufferin-Guelph Health Unit (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1163-78-M: Retail Clerks Union Local 486 (Trade Union) v. Brown Shoe Company of Canada Limited (Employer). (*Granted*).

1211-78-M: Ottawa Newspaper Guild Local 205 (Trade Union) v. Ottawa Journal, Division of F. P. Publications (Eastern) Ltd. (Employer). (*Granted*).

1243-78-M: The Textile Rental Institute of Ontario and Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union) v. Centennial Hospital Linen Services; Booth Avenue Hospital Laundry Inc.; and London Hospital Linen Service (Employer). (*Granted*).

1267-78-M: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Trade Union) v. Dixon Fuels, a Division of CFMG Inc. (Employer). (*Granted*).

1344-78-M: Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union) v. Ottawa Regional Hospital Linen Service Inc. (Employer). (*Granted*).

1361-78-M: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1524 (Trade Union) v. Van Dresser Limited (Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

0650-78-R: Windsor Motion Picture Projectionists Union Local 580 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Canadian Odeon Theatres Ltd. (Respondent) The Odeon Theatres (Canada) Limited (Intervener) v. Employees (Objectors). (*Dismissed*).

0756-78-R: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC (Applicant) v. 368970 Ontario Limited, carrying on business as Discount Food Warehouse (Respondents). (*Dismissed*).

0849-78-R: Canadian Paperworkers Union and its Local 1199 (Applicant) v. Independent Paper Converters Inc. (Respondent) v. Employees (Objectors). (*Granted*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1546-77-M: Christian Labour Association of Canada (Applicant) v. Medi Park Lodges Inc. carrying on business as Crescent Park Lodge (Respondent). (*Granted*).

1091-78-M: Canadian Food and Associated Services Union (Applicant) v. Windsor Arms Hotel Ltd. (Respondent). (*Granted*).

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0665-78-M: Nortex Products Company (Formerly Division of Superpack Corporation Limited) (Employer) v. The United Steelworkers of America, for itself and on behalf of Local Union 6269 (Trade Union). (*Dismissed*).

0905-78-M: Graham Food Products Limited, trading as Hickeson-Langs Supply Company (Employer) v. Teamsters Union Local 419, Chauffeurs, Warehousemen and Helpers of America, and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141 (Trade Unions). (*Granted*).

1253-78-M: Danforth Hotel (Employer) v. International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112A

1113-77-M: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and C. A. Pitts General Contractor Limited (Respondent). (*Dismissed*).

0979-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 552 (Applicant) v. Cullen Plumbing & Heating Limited and Mechanical Contractors Association of Windsor (Respondent). (*Withdrawn*).

1056-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Torino Excavating (1965) Ltd. (Respondent). (*Withdrawn*).

1150-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Coreydale Excavating & Grading Company (Respondents). (*Granted*).

1183-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Frank Watts Sod & Seed Supply Co. Ltd. (Respondent). (*Terminated*).

1188-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 (Applicant) v. Safeguard Sprinkler Sales and Service Limited (Respondent). (*Granted*).

1222-78-M: Marble Masons, Tile Layers and Terrazzo Workers' Union No. 31, affiliated with the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Perfect Tile & Mosaic Company Limited (Respondent). (*Granted*).

1256-78-M: The Carpenters' District Council of Toronto and Vicinity on behalf of its Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. The General Contractors Section of the Toronto Construction Association and Carmac Construction Company Limited (Respondents). (*Granted*).

1266-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 46 (Applicant) v. Yellow Jacket Welding and The Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

1276-78-M: Labourers' International Union of North America, Local 506 (Applicant) v. Canadian National Exhibition Association (Respondent). (*Withdrawn*).

1331-78-M: The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 (Applicant) v. Edera Developments Limited (Respondent). (*Granted*).

1377-78-M: United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Lamparter Mechanical and Contractors Limited and The Mechanical Contractors Association of Toronto (Respondent). (*Withdrawn*).

1424-78-M: International Union of Operating Engineers Local 793 (Applicant) v. Jan Peters Limited (Respondent). (*Withdrawn*).

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0935-78-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. G. Petruccelli and Son Limited (Respondent). (*Certified*). (*Request Denied*).

1104-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Foxhead Inn Ltd. (Respondent). (*Dismissed*). (*Request Denied*).

1555-77-M: Andries Van Es (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., Local 487 (Respondent Trade Union) v. General Concrete Ltd. Hamilton Division (Respondent Employer).

- and -

1652-77-M: Bienze Vanderzwaag (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., Local 487 (Respondent Trade Union) v. General Concrete Ltd. Hamilton Division (Respondent Employer).

- and -

1653-77-M: Arie Van Es (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., Local 487 (Respondent Trade Union) v. General Concrete Ltd. Hamilton Division (Respondent Employer). (*Section 39*). (*Request Denied*).



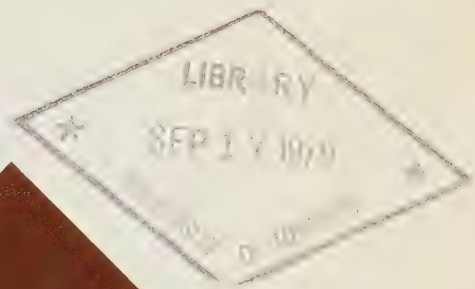
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